Supreme Court, U. S.
FILED
FEB 26 1977
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1976.

No. 76-1182

THOMAS BROWN,

Petitioner,

v.

IVARANS REDERI A/S,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

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No. .

THOMAS BROWN,

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

TO THE HONORABLE, THE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Petitioner, Thomas Brown, prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit, entered in the above case on November 4, 1976 and denial for Petition of Rehearing on November 29, 1976.

OPINIONS OF THE COURTS BELOW.

Defendant's motions for a judgment notwithstanding the verdict or in the alternative for a new trial were denied without opinion (A2). The Opinion of the United States Court of Appeals for the Third Circuit is printed herein as Appendix A4 et seq., and is reported at 545 F. 2d 854 (3rd Cir. 1976). The Order of said Court of Appeals and the denial of Petition for Rehearing is printed as Appendix hereto.

JURISDICTION.

The denial of the Petition for Rehearing of the Decree of the United States Court of Appeals for the Third Circuit was entered on November 29, 1976. The jurisdiction of this Court is invoked under 28 U. S. C. Section 1254(1).

QUESTIONS PRESENTED.

1. When Congress passes amendments to the Longshoremen and Harbor Workers' Compensation Act abolishing for longshoremen the warranty of seaworthiness and absolving the vessel owner of liability if the cause of the injury is the sole negligence of the stevedore and the courts of these United States attempt to fashion novel duties and rights resulting in conflict between circuits and conflict within circuits, should not certiorari be granted so that litigants may have the certainty in the law to which they are entitled?

2. When a trial is bifurcated and the jury is charged separately on liability and damages and renders separate verdicts, and the cause is reversed because of a purported error in the charge, is it not a violation of due process to inferentially grant a new trial on damages when no error is stated by the appellate court?

3. When the courts of these United States have interpreted the amendments to the Longshoremen and Harbor Workers' Compensation Act to empower them to fashion and promulgate a new federal common law, does not such interpretation result in an unconstitutional assumption of the legislative power?

STATEMENT OF THE CASE.

This is a civil action commenced by the plaintiff longshoreman for personal injuries sustained in an accident aboard the vessel M/V Santos on August 2, 1974. All page references are to the Trial Testimony (T. T.) or the Appendix to this Petition (A). The trial resulted in a jury verdict in favor of the plaintiff in the amount of $300,000.00. Defendant shipowner filed motions for judgment n.o.v. and for a new trial which were denied by the trial court without opinion (A2). Appeal was then taken by defendant shipowner to the Court of Appeals for the Third Circuit. An argument was duly held before a panel of that court. The Court of Appeals reversed and remanded the cause for a new trial on the basis that the trial judge's charge to the jury was based in part upon the Restatement (Second) of Torts 416. The trial judge had charged Section 416 after charging, at the defendant's request, Restatement (Second) of Torts Section 343. These sections are discussed at length in the argument portion of this petition. As a result of the remand, plaintiff longshoreman was taxed costs of $3,000.00.

While the opinion of the Court of Appeals does set forth a statement of the facts of the case, it does not recognize that the verdict of the jury resolves all conflicts as between the testimony of the plaintiff's witnesses and defendant's witnesses in favor of the plaintiff.

On August 1, 1974, the M/V Santos docked at Philadelphia, Pennsylvania. Plaintiff was an employee of Atlantic and Gulf Stevedores, Inc. (hereinafter referred to as A & G), an independent stevedoring company who had been engaged by the defendant to discharge cargo from the vessel. Plaintiff, as a holdman, was part of a gang of longshoremen assigned to discharge the cargo from the No. 1 lower hold, the No. 1 lower hold being in the bow of the vessel and the resulting shear of the vessel made

tight quarters for the work of the longshoremen. Expert testimony by a master mariner with some 36 years of experience indicated that the stow of the No. 1 lower hold was negligently done at the prior port of Baltimore.

The cargo stowed in the No. 1 lower hold was barrels and 24-foot lengths of steel. The barrels had been loaded in the immediate prior port in Baltimore in such a way as to abut against the 24-foot lengths of steel and to encumber three-quarters of the hatch opening, thus creating a dangerous discharging situation. It was necessary to discharge the 24-foot angle irons in a hatch opening that was approximately 9 to 15 feet long and 22 feet wide.

The expert master mariner pointed out that it was foreseeable that with the stowage of barrels, steel of this nature would have to be discharged under close quarters and that there was a risk of injury to personnel working in the No. 1 hatch (T. T. 162). It was the opinion of the master mariner that it was advisable to remove some of the barrels and put them elsewhere in order to give the longshoremen working room to remove the steel (T. T. 165). It was also pointed out by the master mariner that it was the duty of the master and the officers of the vessel to be responsible for the proper loading and discharging of the cargo and bear the ultimate responsibility.[1]

It had been testified that because of the close quarters, the steel would hang up on the face of the barrels in the attempt to get the steel out in the limited hatch opening. The master mariner pointed out that this required the longshoremen to pull the draft away from the obstruction and

1. The Standards for Longshoring (29 C. F. R. 1918) as part of the Occupational Safety and Health Act of 1970 (29 U. S. C. 651 et seq.) did not diminish the heretofore responsibilities of the vessel owner. It was clear in the regulations that while they were applicable to the stevedore employer, they were not intended to either enlarge or diminish the responsibilities of the vessel owner as they existed at the time of the adoption of the regulation.

hold it away at which time they would then give the signal to the winchman to go ahead and take the load up. To do otherwise would merely pull the draft away and would result in the draft going back to the face of the barrels where it had been previously lodged.

The master mariner pointed out that this was not the type of cargo where tag lines would be of any assistance. It did not require continuous guidance because it was only necessary to handle the draft for that brief time that it was lodged against the face of the barrels (T. T. 177).

In summary, the testimony of the master mariner called for the removal of sufficient barrels to provide a proper hatch opening. The stevedore superintendent, William Egan, had requested that barrels be removed to provide the necessary hatch opening space. He had communicated this to the deck officer for permission to so do and the permission had been refused (T. T. 110). It was his opinion that the removal of the barrels would enable the steel to be removed in a safer manner. It was his opinion that there was room in other hatches to put some of the barrels and that the stowage in the No. 1 hold where the acident occurred was unsafe (T. T. 117, 118).

The master mariner, on cross-examination, pointed out that cargo planning must take into consideration the order of discharge so that loading operations do not result in an overstow as happened in the instant case; that the responsibility of planning of cargo is that of the ship. One or two alternatives could have been utilized. The vessel owner should have put the barrels in another space or anticipated the necessity of shifting some of the cargo in order to get out the steel (T. T. 197). He also pointed out that from a dollars and cents standpoint, it would have been to the vessel's advantage to have moved the barrels because the discharge of steel would have proceeded more speedily and efficiently (T. T. 198).

While discharging the angle iron on August 1, 1974, the longshoremen experienced ends of the angle iron catching in the wooden barrels and in the plywood separating the tiers of barrels. When the angle iron was so caught, the longshoremen in the hold pulled the angle iron away from the barrels so that it could then be removed from the hold.

Shortly after starting work at 8:00 a.m. on August 2, 1974, plaintiff was injured while discharging a draft of angle iron. He was pulling the angle iron away from the wooden barrels after it caught under the plywood flooring of the barrels. As he pulled on the lower end of the draft, it started swinging toward him. To avoid being struck by the swinging draft, plaintiff ran to the offshore (port) side of the vessel and began climbing up the side of the hold. As he was climbing, he grabbed a sweat batten clip located in a rib on the port side of the hold. The sweat batten clip came out of the rib, causing plaintiff to fall about 15 feet onto the angle iron. As a result of the fall, plaintiff sustained a concussion, multiple contusions, a laceration over the right eye and a dislocation of his right middle finger. Additionally, plaintiff suffered a severe traumatic neurosis.

There was also expert testimony on behalf of plaintiff that it was not necessary to remove the sweat battens but that if they were removed, the clips should have also been removed. The reason for that is that the clips take on the appearance of padeyes and it was foreseeable that in an emergency, a man frantically trying to get out of the way of a swinging draft might grab what appears to look like a padeye in order to pull himself to safety. In the instant case, the clip was of such a nature that it could and would pull out and as plaintiff snatched at it, it did pull out and plaintiff fell as described above.

REASONS FOR GRANTING THE WRIT.

I. The Split of Authority Among the Various Circuits of the Court of Appeals of the United States and the Internal Conflict That Exists Within Various Circuits Themselves as to the Interpretation of the 1972 Amendments to the Longshoremen and Harbor Workers' Compensation Act, 33 U. S. C. Sections 905(b) et seq. Has Resulted in a Conflicting and Inconsistent Non-Uniform Confusing Body of Law That Can Result Only in Serial Trials and Material Injury to the Principle of Judicial Economy.

The amendment of October 27, 1972 to the Longshoremen and Harbor Workers' Compensation Act is set forth at 33 U. S. C. 905(b). It provides:

> "In the event of injury to a person covered under this chapter caused by the negligence of a vessel, then such person, or anyone otherwise entitled to recover damages by reason thereof, may bring an action against such vessel as a third party in accordance with the provisions of section 933 of this title and the employer shall not be liable to the vessel for such damages directly or indirectly and any agreements or warranties to the contrary shall be void. If such person was employed by the vessel to provide stevedoring services, no such action shall be permitted if the injury was caused by the negligence of persons engaged in providing stevedoring services to the vessel . . . The liability of the vessel under this subsection shall not be based upon the warranty of seaworthiness or a breach thereof at the time the injury occurred. The remedy provided in this subsection shall be exclusive of all other remedies against the vessel except remedies available under this chapter."

The statute itself speaks in clear language. It preserves the longshoreman's cause of action for negligence by the vessel owner. It abolishes a cause of action on behalf of a longshoreman for unseaworthiness and it absolves the vessel owner of absolute liability or responsibility if the injury was solely caused by the negligence of longshoreman's fellow servant.

The legislative history which consists of committee reports of both the House and the Senate indicates that it was the view of the drafters of this Amendment that by taking these far-reaching steps, the longshoreman would no longer be accorded the benefits of absolute liability on the part of the vessel owner for their injuries, and be put to the requirement of showing negligence on the part of the vessel owner.

An examination of the legislative history of the Amendments points out certain salient features. First, the Congressional Committee refused the plea that all third-party actions be eliminated either by outright prohibition or by the device of making the vessel owner a statutory employer. This rejection came about because the committees felt that neither the provisions of the Occupational Safety and Health Act, with its penal provisions or the no-fault liability of the Stevedore-employer under the Longshoremen and Harbor Workers' Compensation Act would protect the longshoremen from injury. The committees had noted the extraordinarily hazardous nature of longshore employment.

It was felt that the preservation of the cause of action for negligence against the vessel owner is essential as a parallel motivation for promoting safety and preventing accidents. *Lucas v. "Brinknes" Schiffahrts Ges.*, 379 F. Supp. 759 (E. D. Pa., 1974):

> "At the same time, however, Congress was concerned that the vessel owner not become lax in doing what it should reasonably be required to do to prevent injuries to the longshoremen. The common law negligence remedy was thought sufficient to provide the vessel with the necessary incentive. The argument by the *amicus curiae* that the shipowner can be liable only when it is solely negligent would negate Congress' intention to prevent shipowner negligence and is contrary to the terms of the Act. The Act clearly provides for such a suit regardless of the concurrent negligence by the stevedore. If Congress intended that the vessel could be liable only when its negligence was the sole cause of the injuries, the mere insertion of the word 'solely' in the first sentence of subsection 5(b), 33 U. S. C. § 905(b) would have accomplished the result." At page 769.

We do believe that Congress, by its language, has issued a mandate to the Courts that they will not permit nor can there be justified a position that an employee injured aboard a vessel shall in any way or in any manner receive less rights than an employee who is injured on land. Thus a longshoreman injured aboard a vessel should receive the benefits of all Sections of the Restatement (Second) of Torts received by those who work in non-maritime land-based positions. One such Section is 416, recognized and applied by Courts in Pennsylvania.

In *McDonough v. U. S. Steel Corp.*, 324 A. 2d 542 Pa. Super. 1973, an Appellate Court of the Commonwealth of Pennsylvania applied Sections 413 and 416 of the Restatement of Torts, 2d for injuries resulting to an employee of an independent contractor in which the possessor of land was the defendant. The Court in establishing the liability of the possessor of land stated:

> Normally, an employer of an independent contractor is not responsible for the negligent acts or

omissions of the contractor or its employees. Hader v. Coplay Cement Mfg. Co., 410 Pa. 139, 189 A. 2d 271 (1963). When an emloyer has exercised care in choosing a careful and competent contractor to do work on the employer's premises, and has entrusted the control and possession of the premises, and the performance of the task to that contractor, the employer is generally shielded from liability to third parties due to the negligence of the contractor. An employer, however, must use reasonable care to make the premises safe, or warn the contractor of any dangerous condition thereon. Grace v. Henry Disston & Sons, Inc., 369 Pa. 265, 85 A. 2d 118 (1952).

There are, however, exceptions to this general rule of non-liability, and the instant case, falls within one of these exceptions. The exception does not rest upon any personal negligence of the employer, but is a rule of vicarious liability. The rule is stated in Section 416 of the Restatement of Torts, 2d:

> "One who employes an independent contractor to do work which the employer should recognize as likely to create during its progress a peculiar risk of physical harm to others unless special precautions are taken, is subject to liability for physical harm caused to them by the failure of the contractor to exercise reasonable care to take such precautions, even though the employer has provided for such precautions in the contract or otherwise."

In the instant case, the appellee contended that the decedent was exposed to a peculiar risk ("running the edge" at night) which necessitated special precautions (the provision of adequate lighting to illuminate the pile) that the contractor negligently failed

to take. Thus, the appellee argues that appellant was properly found liable for the contractor's failure to take said precautions.

* * *

> Section 416 is thus applicable only to situations in which the negligence of the independent contractor consists of the failure to take the precautions necessary for the safe performance of a task.

At 545-546. [Footnotes omitted.]

In *McDonough, supra,* the Court recognized that an application of Section 416 is not true vicarious liability but is liability arising from scienter of a dangerous condition and a failure to act to prevent injuries to another when it held:

> "Because of the 'particular surrounding' of the operation, the previous night shift accidents, and the presence of its safety personnel at the job site, appellant knew or should have known of the visibility problems attending the nighttime stockpiling. The jury was thus fully justified in finding a recognizable peculiar risk, and holding appellant liable for the contractor's failure to take the special precaution of providing artificial lighting. (Footnotes omitted)"

At page 547.

See also *Philadelphia Electric Co. v. Julian,* 228 A. 2d 669, 671, 425 Pa. 217, 1967, in which the Pennsylvania Supreme Court applied Sections 427 and 416 of the Restatement of Torts, 2d. The case is important in that it applied Section 416 where the defendant was clearly at fault so that the Court found no need to apply or discuss vicarious liability.

In *Croshaw v. Koninklije Nedlloyd, B. V. Rijswljk,* 398 F. Supp. 1224 (D. Ore. 1975), the Court recognized

that an application of Section 343 must also take into account, inter alia, Section 416 of the Restatement of Torts, 2d when applicable and when the vessel owner has scienter (at p. 1230).

In the instant case, the Court charged Section 343 of the Restatement of Torts, 2d. At plaintiff's request, it also charged Section 416 of the Restatement of Torts, 2d because there was evidence that a peculiar risk had been created by the vessel owner. An agent of the vessel owner had refused permission to permit a method of discharge that could have accomplished the task in safety and required the stevedore to take out the steel under conditions which created a foreseeable risk of injury to the plaintiff. The factual situation closely paralleled *McDonough, supra.*

Were the plaintiff not a longshoreman and were the shipowner an owner of a warehouse with hatch openings instead of doors the charge of Section 416 would not only have been permissible but mandated under Pennsylvania law. Yet the plaintiff's verdict by the jury is set aside on the basis that to adopt Section 416 of the Restatement is in some way abhorrent to the uniformity required by Congress.

The question then arises whether the comments by the Congressional committee that the rights of the longshoremen shall be analogized to that of a shore-based employee or that the duties of the shipowner shall parallel that of a shoreside employer in any way minimizes the pre-existing parameters of the maritime cause of action for negligence and the duties that were placed upon the vessel owner. This was made clear by the Committee when it said:

> "Under this standard, as adopted by the Committee, there will, of course, be disputes as to whether the vessel was negligent in a particular case. Such issues can only be resolved through the application of accepted principles of tort law and the ordinary process of litigation just as they are in cases involving negligence by land-based third parties. *The Committee intends that on the one hand an employee injured on board a vessel shall be in no less favorable position vis a vis his rights against the vessel as a third party than is an employee who is injured on land,* and on the other hand, that the vessel shall not be liable as a third party unless it is proven to have acted or have failed to act in a negligent manner such as would render a land-based third party in non-maritime pursuits liable under similar circumstances. 3 1972 U. S. Code Cong. & Admin. News 4698, 4702-04 (Emphasis added)."

Ordinarily, it would hardly be appropriate to apply for a Petition for a Writ of Certiorari to this Court following the grant of a new trial by the Court of Appeals, but the plaintiff, longshoreman, in light of the intrusion into the legislative process by various Circuits of the Courts of Appeals, resulting in conflicts between these Circuits and within Circuits, and a complete absence of uniform legal direction, has placed him in an entirely untenable situation. The seriousness of the situation is seen easily through a brief review of what various circuits have done with this statute.

Hite v. Maritime Overseas Corporation, 380 F. Supp. 222 (E. D. Texas 1974) was the first example of the court's assuming the role of legislatures and fashioning the duties of the ship owner within the framework of Restatement (Second) of Torts Section 343:

> "A possessor of land is subject to liability for physical harm caused to his invitees by a condition on the land if, but only if, he

(a) knows or by the exercise of reasonable care would discover the condition, and should realize that it involves an unreasonable risk of harm to such invitees, and

(b) should expect that they will not discover or realize the danger, or will fail to protect themselves against it, and

(c) fails to exercise reasonable care to protect them against the danger."

To the extent that the Federal Courts have applied the *Hite* case, they have thwarted the intention of Congress that there be preserved to the longshoremen their traditional cause of action for negligence. They have misread the allusions to shoreside law, but even if the legislative history would countenance a substitution of shoreside law for the traditional cause of action for negligence, the singular naked application of Section 343 is not justified. If only Section 343 of the Restatement (Second) of Torts applied, then it would mean that the longshoremen would have rights far below that of the ordinary shoreside worker in a similar position.

The Court of Appeals when speaking in *Brown* would accept Sections 281-83, 302A, 305 and 452 of the Restatement (Second) of Torts albeit they rejected Section 416. They have also specifically rejected Section 343A which carries with it an inferential rejection of Section 343 (Section 343A being a dilution of Section 343). On the other hand, the Second Circuit of the Court of Appeals in *Napoli v. Hellenic Lines,* 536 F. 2d 505 (2nd Cir. 1976) rejected Section 343 and delineated Section 343A as the orbit of the shipowner's duties.

In *Gay v. Ocean Transport and Trading, Ltd.,* – F. 2d – (5th Cir. 1977), (see Appendix for a copy of this Opinion), certain principles were set forth:

"From these passages and section 905(b) itself we distill the following conclusions:

(1) Congress intends for the federal courts to develop a uniform federal common law to control LHWCA suits against vessels.[6]

(2) That LHWCA federal Common Law is to be based on negligence concepts; the unseaworthiness of a vessel is not an acceptable ground for relief.

(3) LHWCA negligence law is to be guided primarily by analogy to land-based law concepts.[7] The stevedore is to be viewed generally as an independent contractor and its employees as invitees of the vessel owner.

(4) However certain common land-based principles of state law are not to be carried over into the federal law governing LHWCA suits. Assumption of risk may not be utilized as a defense, and comparative negligence, rather than contributory negligence, is to be applied." (Footnotes omitted) (A31-32).

Then the court in *Gay* paradoxically distilled from these principles Sections 343 and 343A which are the embodiment of the concept of assumption of the risk which Congress specifically precluded in the legislative history. In addition, the court went on to say that the plaintiff had argued that the vessel had a non-delegable duty to provide the longshoremen with a safe place to work. The court in commenting on this said:

"But this is exactly the type of liability without fault concept from which Congress sought to free vessels by the passage of the 1972 Amendments.[10]" (Footnotes omitted) (A35-36).

In fact, the non-delegable duty to furnish a safe place to work was never a concept without fault, but a principle of negligence as was pointed out in *Michalic v. Cleveland Tankers,* 364 U. S. 325, 5 L. Ed. 2d 20, 81 S. Ct. 6 (1960). The Court in *West v. United States,* 361 U. S. 118, 123, 4 L. Ed. 2d 161 (1959) stated that one aspect of the shipowner's duty to refrain from negligent conduct is embodied in his duty to exercise reasonable care to furnish a safe place to work. See also *Earle v. Union Barge Lines Corporation,* 486 F. 2d 1097, 1104 (3rd Cir. 1973).

In *Guerra v. Bulk Transport Corp., et al.,* — F. 2d — , (5th Cir. 1977) (see Appendix pp. A36 to A41), the Court of Appeals for the Fifth Circuit was faced with findings by the Court sitting as the finders of fact that in which the Court had applied Section 343 of the Restatement of Torts. The traditional rule of Section 343 was rejected by the Court but still the judgment was affirmed:

> "Despite our rejection of the traditional rule, we still affirm the judgment of the district court in this case. Even though the crew of the vessel was aware of the dangerous condition presented by the stack of pallets, it was the stevedore who created the hazard in the first place and it was the stevedore that failed to tie the pallets down and then carelessly knocked one into the hold. This was not the type of danger that must be faced notwithstanding knowledge. The finding of the district court that the stevedore's negligence was the sole proximate cause of Guerra's injury is not clearly erroneous." (A41)

Yet, inferentially, the Court recognized the plight of the individual longshoreman as an economic pawn in its footnote:

> "In *Brock v. Coral Drilling, Inc.,* 477 F. 2d 211 (5th Cir. 1973), we recognized similar principles in a LHWCA case in which the 1972 Amendments were not applicable. In that case, the plaintiff Brock was aware of hazardous conditions existing on the vessel on which he was working, but continued to work after protests to his supervisor proved unavailable. We affirmed a finding that Brock had met the standard of ordinary prudence, noting that he was economically dependent upon the stevedore for future employment. *Id.* at 215." (A40)

In a further footnote, the Court recognized the incongruity of these Sections relating to owners of land being applied to vessels:

> "20. By adopting as guidelines the land-based principles found in the Restatement (Second of Torts, we do not indicate, of course, that vessel owners have the identical duties of owners of land. A ship presents its own special hazards. As always, a determination of the reasonableness of a defendant's actions (or lack thereof) requires an examination of all the circumstances surrounding the injury." (A41)

The Fourth Circuit in *Anuszewski v. Dynamic Mariner Corp., Panama,* 540 F. 2d 757 (4th Cir. 1976) in a *per curiam* Opinion placed its stamp of approval on Section 343. The factual situation illustrates the unjustified harshness of Section 343 and its inappropriateness to longshoremen working aboard ship:

> "Anuszewski and Gutowski were longshoremen employed by the Stevedoring company, Nacirema Operating Co., Inc., which had been hired to offload Dynamic's vessel, the MS Tarpona. The offloading began on February 17, 1973, and continued through

the following day. The hatch covers on the vessel were each supported by four beams which were normally locked into place by a series of pins but which were unsecured on this occasion. The longshoremen discovered the condition on February 17, 1973, and reported it to their foreman who directed them to continue their work, stating that it would be corrected. The men continued to work but the situation was not corrected. In order to offload the cargo area three of the four beams under each hatch were removed by the longshoremen but the fourth was left in place but unsecured. On February 18th, while the cargo from the lower hold was being discharged the cargo boom dislodged the beam under the lower hold hatch causing it to fall into the lower hold striking and injuring Anuszewski and Gutowski."

At page 758.

This should be compared with the very illustration given in the legislative history that if there is oil on the deck and a longshoreman later slips on that oil the shipowner is liable. That very example should lay to rest any attempt to engraft Section 343 or even 343A into the duty of care. There is a conflict in the Fourth Circuit itself. In *Bess v. Agromar Line*, 518 F. 2d 738 (4th Cir. 1975), the Court of Appeals was confronted with another "open and obvious" condition. The same circuit court not only did not apply Section 343 as a rigid criteria but went on to say:

> "There is no allegation or evidence that the vessel was unseaworthy or that the hold was not a safe place to work when the vessel was turned over to the independent stevedoring contractor.[8]"
>
> . . . .

> "8. We do not intend to suggest that the shipowner's duties to the longshoremen ended when it turned the vessel over to the stevedore in a safe condition. Subsequent duties may arise depending upon the facts of the case. See *White v. United States*, 400 F. 2d 74 (4 Cir. 1968) (Although *White* was a pre-amendment case it is pertinent here because it proceeded upon negligence principles; the doctrine of seaworthiness was not applicable because the vessel in question was not in navigation at the time of the accident)." At pages 741-742.

To further complicate the legislative process undertaken by the courts, the Court of Appeals for the Third Circuit added a new dimension in *Marant v. Farrell Lines*, – F. 2d – (3rd Cir., 1977) (see Appendix for a copy of this Opinion). In that case the vessel arrived with an improper stow. The longshoremen attempted to deal with the problems created by the improper stow. Plaintiff longshoreman was injured when a wall of bags fell upon him. The jury found that there was concurrent negligence on the part of the vessel owner and the stevedore and inasmuch as that issue was submitted to the jury they found each 50% negligent and such negligence an approximate cause of plaintiff's injuries. The court charged that there could be more than one proximate cause of plaintiff's injuries but if the stevedore's negligence was the sole cause of the accident then no verdict could lie against the vessel owner. The Court of Appeals for the Third Circuit reversed on the grounds that the Court did not charge the jury that the primary duty for the safety of a longshoreman is yoked upon the independent stevedore. The Court of Appeals in *Marant* reversed and in so doing said:

> "To say that responsibility is concurrent or joint is plainly inconsistent with the intention of the Act to

place primary responsibility on the stevedore." (A45).

Thus, almost twenty (20) years after the Court laid to rest apparently once and for all obsolescent, outworn and meaningless conceptional distinctions of invitee, licensee, et al. in *Kermarec v. Compagnia Generale Transatlantique*, 358 U. S. 625 (1959), new such distinctions, this time of primary and secondary liability, distinctions virtually impossible to communicate to a jury, arise like a phoenix emerging from the ashes of reason. At this point the plaintiff, longshoreman, in this case absent the granting of Certiorari by this Court, faces a new trial with the law in shambles and the prospect of serial verdicts and serial appeals with serial potential judgments for legal costs hanging over him like the Sword of Damocles. It was with a touch of irony that the Third Circuit in *Griffith v. Wheeling Pittsburgh Steel Corporation*, 521 F. 2d 31 (3rd Cir. 1975) in dealing with the amendments explored the possible ramifications of the amendments ranging from the application of Jones Act negligence to Section 343 and then said:

> "We cannot in this case do more than suggest that there is a problem.[24] The district court did not decide any standard of care issue, and none is before us in a context sufficiently concrete and adversary for our decision at this time." (Footnote omitted)
>
> At page 45.

It is important that this Court act to restore sanity and balance to the state of the law. If Certiorari were to be granted we would urge upon this Court that the age-old maritime concepts of negligence be applied as they were before and after *Sieracki v. Seas Shipping Company*, 328 U. S. 85, 9 L. Ed. 2d 1099, 66 S. Ct. 872 (1946). Were

this to be followed, the requirements of scienter would then provide a broad equation of maritime rights and duties with shoreside rights and duties. An alternative would be the use of the Restatement of Torts not limited to a single section, but considering its full scope and applicability as it must do if the mandate of Congress is to be followed, that an employee on board a vessel shall be in no less favorable a position as an employee injured on land:

The Restatement of Torts, Second, is a codification of shoreside common law relating to the duties of a possessor of land and the duties of an employer of an independent contractor as to invitees who were employees of that independent contractor. It has the significant virtue of being national in scope and thus, apart from reflecting the highest level of legal scholarship, it provides the desirable uniformity that the Congressional reports looked to.

If there are geographical differences, then it behooves the Court to seek the highest denominator when drawing a parallel between a longshoreman and a shoreside worker. This was the very process that ensued in *Moragne v. States Marine Lines*, 398 U. S. 375, 26 L. Ed. 2d 339, 90 S. Ct. 1772 (1970), where the Court adopted the highest common denominator which was the Death on the High Seas Act. This act was superior to the Jones Act in that it did not have the inequities of favoring one class of dependents over another and it was far superior to many of the individual state acts including the inequity of the West Virginia death statute which places a limit of $20,000 on a wrongful death action. *Cf. Goett v. Union Carbide Corp.*, 361 U. S. 340, 41 L. Ed. 2d 341, 80 S. Ct. 357 (1966).

It is prayed that a Petition for Certiorari should be granted so that the longshoreman plaintiff in this case must not again and possibly again run the shoals of uncharted law.

II. A Bifurcated Trial, Where There Is No Finding by the Trial Court That the Damage Verdict Was Excessive or Otherwise Not Supported by the Evidence and Where There Was No Finding of Trial Error Relating to the Damage Portion of the Case by the Court of Appeals, Judicial Economy Requires That in the Event of a New Trial Relating to Liability, That the Damage Verdict, Clearly Untainted, Should Stand and Not Be the Subject of a Second Trial.

The appropriate test to be applied by a Court hearing a motion for a new trial based upon an allegation that the verdict was against the weight of the evidence (e.g. that the damage finding was excessive) is whether there is sufficient evidence existing on the record which, if accepted by the jury, could sustain a verdict in favor of the prevailing party. A trial judge abuses his discretion by substituting his evaluation of the evidence for that of the jury, *Hourston v. Harvlan, Inc.*, 457 F. 2d 1105 (3rd Cir. 1972).

In *Lind v. Schenley Industries, Inc.*, 278 F. 2d 79 (3rd Cir. 1969), Cert. denied 364 U. S. 835, 5 L. Ed. 2d 60 (1960), the Court stated that a trial judge should not interfere with a jury verdict unless it is clear that the jury has reached a seriously erroneous result and that it should not set aside the verdict merely because the Court would have come to a different conclusion had it been the trier of facts.

The scope of an Appellate Court's review of a District Court's denial of such motion is even narrower. The trial judge's determination will not be reversed unless it is clearly erroneous. *Hadco Products, Inc. v. Frank Dini Company,* 401 F. 2d 462 (3rd Cir. 1968). Appellate Courts rarely find that the trial judge abused his discretion and the trial judge's determination is not reviewable or appealable except in the most exceptional circumstances, *Silverii v. Kramer,* 314 F. 2d 407 (3rd Cir. 1963).

The inferential ordering of a new trial for damages by the Court of Appeals not only violated all principles of judicial appellate review, but it violated more fundamental concepts of judicial economy.

The fact that the trial had been bifurcated and that the jury, in separate verdicts dealt with the matter of liability and damages was ignored by the Court of Appeals. The opinion of the Court never reaches the damage portion of the case except to suggest in an oblique way that perhaps on a retrial the Court might consider an impartial medical examination. Yet the record shows that it was the treating doctor that testified for the plaintiff, that an expert physician employed by the defendant concurred in the diagnosis of a severe traumatic neurosis. Both physicians concurred in the need for intense psychiatric care and the only deviation was on the prognosis after such intensive psychiatric care. The jury by its verdict adopted the opinion of the treating physician rather than the defendant's physician. Yet, to borrow a phrase, plaintiff must be placed in double jeopardy as to his burden of proving his damages despite the fact that the trial was reversed as a result of a very narrow issue, namely the charge in Section 416 of a Restatement (2nd) of Torts in the liability phase of the case.

It is respectively submitted that this inferential granting of a new trial for damages by the Court of Appeals not only violates all principles of judicial appellate review but in addition does violence to those fundamental concepts of judicial economy which were sought by trial bifurcation.

III. The Various Circuits of the Courts of Appeals, in Creating Rights and Duties Under the 1972 Amendments to the Longshoremen and Harbor Workers' Act, Have Unconstitutionally Assumed Power Available Only to the Legislature.

If Congress intended a new cause of action with new duties and rights, then it was the responsibility of Congress to write out these duties and rights in clear and precise language, or provide an adequate and unequivocal reference by which those rights and duties could be determined. As an example, the Jones Act, 46 U. S. C. § 680, created a new cause of action of Seamen by incorporating by reference the Federal Employees Liability Act, 45 U. S. C. §§ 51 et seq., and the case law which had been decided thereunder.

It is not the purpose of this section of the brief to involve this Court in the maelstrom of constitutional principles effected by a delegation of a legislative power of Congress to a coequal department of the government namely in this case the judiciary. Cf. *Schecter v. United States,* 295 U. S. 495, 79 L. Ed. 1570 (1935).

The United States Constitution contains no specific prohibition against the delegation of the legislative powers of Congress, but it is logically deduced that since the Constitution divides the government into three distinct divisions, it does not lie in the power of Congress to delegate its power to another governmental division." *Re Lasswell* (1934) 1 Cal. App. 2d 183, 36 P. 2d 678.

Independent of any written constitution, John Locke write in 1689: 'The legislature cannot transfer the power of making laws to any other hands, for, it being but a delegated power from the people, they who have it cannot pass it over to others.' *People ex rel. Thomson v. Barnett,* (1931) 344 Ill. 62, 176 N. E. 108, 76 A. L. R. 1044.

This is not a circumstance where administrative rules and regulations are being authorized but instead involves a determination of rights and duties. There may not be the equivalent responsiveness of the judiciary to the matters of policy that are inherent in a statute that would change such rights and duties. A legislator must stand for re-election. He has no life tenure.

The Committee Reports never even hinted at Section 343 or even the more enlightened Section 343A. The Committee Reports never said that if the condition confronting a longshoreman is openly and obviously hazardous he must bear the risk should he be hurt. These are judicial inventions. Nothing was said in the Committee Reports of primary and secondary liability. These are judicial inventions.

It would be an unconstitutional delegation of power to accept the premise that the Court of Appeals or any Court can create a new standard of care to govern actions by longshoremen or other harbor workers who are injured aboard vessels.

CONCLUSION.

Plaintiff longshoreman faces another long and expensive trial subjecting himself to further liability for costs, thus imperiling his meager assets in a context in which there are indications of judicial ambiguities until this Court can lead this type of litigation out of the welter of uncertainty and the risks to the parties of serial trials and serial appeals.

Respectfully submitted,

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DISTRICT COURT CIVIL JUDGMENT.

IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CIVIL ACTION NO. 74-2952.

THOMAS BROWN

v.

IVARANS REDERI A/S

Civil Judgment

BEFORE HONORABLE JAMES H. GORBEY

AND Now, this 16th day of September 1975, in accordance with answers to interrogatories and the jury's verdict,

IT IS ORDERED that Judgment be and the same is hereby entered in favor of plaintiff Thomas Brown and against defendant Ivarans Rederi A/S in the amount of THREE HUNDRED THOUSAND DOLLARS ($300,000.00) together with costs.

By THE COURT:

ATTEST:
MARGUERITE L. McCAFFREY,
Marguerite L. McCaffrey,
Deputy Clerk.

DISTRICT COURT ORDER.

IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CIVIL ACTION No. 74-2952.

THOMAS BROWN

v.

IVARANS REDERI, A/S

Order

AND Now, this 7th day of November, 1975, upon consideration of defendant's motion for judgment notwithstanding the verdict, or in the alternative for a new trial, it is ORDERED that said motions are DENIED.

By THE COURT:

JAMES H. GORBEY,
James H. Gorbey,
U. S. District Judge.

COURT OF APPEALS OPINION.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 76-1037

THOMAS BROWN

v.

IVARANS REDERI A/S,
Appellant

(D. C. Civil No. 74-2952)

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Argued September 8, 1976

Before VAN DUSEN, HUNTER and WEIS, *Circuit Judges*

Robert B. White, Jr., Esq.,
Rawle & Henderson,
Philadelphia, Pa.,
Attorneys for Appellant

Avram G. Adler, Esq. &
Stanley Paul Kops, Esq.,
Philadelphia, Pa.,
Attorneys for Appellee

Opinion of the Court
(Filed November 4, 1976)

VAN DUSEN, *Circuit Judge.*

This is an appeal by a vessel owner in an action brought by the plaintiff-longshoreman for personal injuries sustained in an accident aboard the defendant's vessel, the M/V Santos, on August 2, 1974. The trial resulted in a jury verdict in favor of the plaintiff in the amount of $300,000. This appeal presents us with issues, discussed but not decided in *Griffith v. Wheeling Pittsburgh Steel Corporation*, 521 F. 2d 31, 44-45 (3d Cir. 1975), concerning the proper construction and application of the negligence remedy created by § 18(a) of the Longshoremen's and Harbor Workers' Compensation Act Amendment of 1972, Pub. L. No. 92-576, 86 Stat. 1263, 33 U. S. C. § 905(b), amending § 5 of the Longshoremen's and Harbor Workers' Compensation Act, ch. 509, § 5, 44 Stat. 1426, 33 U. S. C. § 905 (LHWCA). Because we believe the district court misconstrued § 905(b) of the 1972 Amendments in the action below, we reverse and remand for further proceedings.

I. THE ACCIDENT

Most of the facts of this case are undisputed; we shall identify contested portions in our statement of them below.

On August 1, 1974, the M/V Santos docked at Philadelphia, Pa. Atlantic & Gulf Stevedores, Inc. (hereinafter A & G), an independent stevedoring company, was engaged by defendant to discharge cargo from the vessel. Plaintiff, an employee of A & G, was a holdman in a gang of longshoremen assigned to discharge cargo from the No. 1 lower hold. The cargo to be discharged from the forward No. 1 hold consisted of drums of ore and packages of angle iron, 20 feet long, that were stowed lying fore and aft in

this part of the hold. The drums of ore were stowed on top of the angle iron. Aft of the angle iron and drums of ore were empty wooden barrels. The distance between the empty wooden barrels and the angle iron was not over three feet.[1] The empty wooden barrels occupied two-thirds or three-quarters of the hatch opening; as a consequence about one-half of the length of the angle iron was under the forward hatch coaming. The remaining one-third or one-quarter of the hatch opening through which the drums of ore and angle iron had to be discharged was described as being between 9 and 15 feet. The 9 to 15 foot dimension was in the fore and aft direction of the hatch. The width of the hatch opening was approximately 22 feet. There was controverted testimony by experts for both parties as to whether or not the proximity of the wooden barrels to the angle iron created a dangerous discharging situation. The gang boss for the A & G gang assigned to the No. 1 hold was a substitute for the regular gang boss. The three holdmen working with plaintiff in the No. 1 hold were not regular members of the gang; however, the plaintiff was.

Discharging the drums of ore began at 8 o'clock A. M. on August 1, 1974, and concluded at about 3:30 P. M. of that same day. Thereafter, discharging of the angle iron commenced. On August 1, 1974, angle iron was discharged until 7 o'clock P. M. Eighteen drafts of angle iron were discharged in this period. Because of the barrels, discharging of the angle iron through the 9 to 15 foot opening was accomplished by wrapping a cable three times around

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1. The record does not clearly indicate the distance from the ends of the angle iron to the barrels. For instance, Egan, the longshoremen's ship boss, testified that the steel angle irons "were right up to the barrels." N. T. at 104. McGrath, the stevedoring superintendent, testified to a distance of "a foot and a half or two feet." N. T. at 251. Johans, a cargo supervisor who inspected the vessel shortly after the accident, testified that the distance "seemed to [him] to be about two to three feet." N. T. at 328.

the ends closest to the wooden barrels and a second cable of the same length one time around the other ends. The two cables were then inserted into a hook on the end of a hoisting cable and the angle iron was lifted out of the hold by winches. In this manner the angle iron was discharged at an angle with the ends closest to the wooden barrels higher than the other ends. While discharging the angle iron on August 1, the longshoremen experienced the ends of the angle iron closest to the wooden barrels catching in the wooden barrels and in the plywood separating the tiers of wooden barrels. When the angle iron caught in the wooden barrels or the plywood, the longshoremen in the hold pulled the angle iron away from the wooden barrels so that it could be removed from the hold. There was controverted testimony as to whether or not the A & G ship boss had made a request to the vessel's deck officer for permission to remove the barrels.[2] The evidence is clear that the stevedore did not utilize tag lines to unload the angle iron; however, the stevedore's ship boss testified that under the circumstances their utilization would have been useless or unsafe. Also, the record indicated non-compliance by A & G, as the employer of Brown, with applicable regulations of OSHA, including 29 C. F. R. § 1918.81(f) concerning tag lines.[3]

2. Egan testified that he had personally asked the vessel's deck officer for permission to remove the barrels. N. T. at 109-10. McGrath testified that making such a request would be within the realm of his authority, not Egan's, and that he had made no request. N. T. at 256. Zolinas, the gang boss, testified that he knew of no request to remove the barrels. N. T. at 362.

3. The applicable House Committee Report No. 92-1441 accompanying H. R. 12006, which became P. L. 92-576 containing the 1972 amendments to the LHWCA, contained this paragraph (Vol. 3, 1972 U. S. Code Cong. & Admin. News, p. 4705);

> "Finally, the Committee wishes to emphasize that nothing in this bill is intended to relieve any vessels or any other persons from their obligations and duties under the Occupational Safety and Health Act of 1970. The Committee recognizes that progress has been made in reducing injuries in the longshore industry, but longshoring remains one of the most hazardous types of occupations. The Committee expects to see further progress in reducing injuries and stands ready to immediately reexamine the whole third party suit question if it appears that the changes made in present law by this bill have affected progress in improving occupational health and safety."

Shortly after starting work at 8 o'clock A. M. on August 2, 1974, plaintiff was injured while discharging a draft of angle iron. He was pulling the angle iron away from the wooden barrels after it caught under plywood. As he pulled on the lower end of the draft, it started swing-

See also 33 U. S. C. § 941(a) (1970) of the LHWCA, quoted below at page 11.

The OSHA Safety and Health Regulations for Longshoring, 29 C. F. R. § 1918.1, *et seq.*, in sections pertinent to this case, provide *inter alia:*

"§ 1918.2 Scope and responsibility.

"(a) The responsibility for compliance with the regulations of this part is placed upon 'employers' as defined in § 1918.3(c).

"(b) It is not the intent of the regulations of this part to place additional responsibilities or duties on owners, operators, agents or masters of vessels unless such persons are acting as employers, nor is it the intent of these regulations to relieve such owners, operators, agents or masters of vessels from responsibilities or duties now placed upon them by law, regulation or custom.

"§ 1918.3 Definitions.

"(a) The term 'shall' indicates provisions which are mandatory.

. . .

"(c) The term 'employer' means an employer any of whose employees are employed, in whole or in part, in longshoring operations or related employments, as defined herein within the Federal maritime jurisdiction on the navigable waters of the United States.

"(d) The term 'employee' means any longshoreman, or other person engaged in longshoring operations or related employments, within the Federal maritime jurisdiction on the navigable waters of the United States, other than the master,

ing toward him. To avoid being struck by the swinging draft, plaintiff ran to the offshore (port) side of the vessel and began climbing up the side of the hold. As he was climbing, he grabbed a sweat batten clip located in a rib on the port side of the hold. The sweat batten clip came out of the rib, causing plaintiff to fall about 15 feet onto

3. (Cont'd.)

ship's officers, crew of the vessel, or any person engaged by the master to load or unload any vessel under 18 net tons.

. . .

Subpart D—Working Surfaces

"§ 1918.31 Hatch coverings.

"(a) No cargo, dunnage, or other material shall be loaded or unloaded by means requiring the services of employees at any partially opened intermediate deck unless either the hatch at that deck is sufficiently covered or an adequate landing area suitable for the prevailing conditions exists: *Provided, however,* That in no event shall such work be done unless the working area available for such employees extends for a distance of 10 feet or more fore and aft and athwartships.

. . .

"§ 1918.32 Stowed cargo and temporary platforms.

. . .

"(b) When an edge of a hatch section or of stowed cargo more than 8 feet high is so exposed that it presents a danger of an employee falling, the edge shall be guarded by a safety net of adequate strength to prevent injury to a falling employee, or by other means providing equal protection under the existing circumstances.

"(c) When two gangs are working in the same hatch on different levels, a safety net shall be rigged and securely fastened so as to prevent men or cargo from falling.

. . .

Subpart H—Handling Cargo

"§ 1918.81 Slinging.

"(a) Drafts shall be safely slung before being hoisted. Loose dunnage or debris hanging or protruding from loads shall be removed.

. . .

"(c) Drafts of lumber, pipe, dunnage and other pieces, the top layer of which is not bound by the sling, shall be slung in such a manner as to prevent sliders. Double slings shall be

the angle iron. As a result of the fall, plaintiff sustained a concussion, multiple contusions, a laceration over the right eye and a dislocation of his right middle finger. Additionally, plaintiff suffered a traumatic neurosis. Plaintiff was an inpatient at Albert Einstein Medical Center from August 2 to August 5, 1974. The permanency of the plaintiff's injuries was a controverted issue at trial.

II. The Trial Court's Instructions

The trial judge's charge to the jury was based in part upon the Restatement (Second) of Torts § 416.[4] Pertinent

3. (Cont'd.)

used on unstrapped dunnage, except when, due to the size of hatch or deep tank openings, it is impractical to use them.

. . .

"(f) Loads requiring continuous manual guidance while in motion shall be provided with tag lines.

. . .

"§ 1918.83 Stowed cargo, tiering and breaking down.

"(a) When necessary, cargo shall be secured or blocked to prevent its shifting or falling.

"(b) In breaking down, precautions shall be taken, when necessary, to prevent the remaining cargo from falling."

4. Restatement (Second) of Torts § 416 provides:

"§ 416. Work Dangerous in Absence of Special Precautions

"One who employs an independent contractor to do work which the employer should recognize as likely to create during its progress a peculiar risk of physical harm to others unless special precautions are taken, is subject to liability for physical harm caused to them by the failure of the contractor to exercise reasonable care to take such precautions, even though the employer has provided for such precautions in the contract or otherwise.

. . .

"Comment:

"a. There is a close relation between the rule stated in this Section, and that stated in § 427, as to dangers inherent in or normal to the work. The two rules represent different forms of statement of the same general rule, that the employer remains liable for injuries resulting from dangers which he should

portions of that charge, particularly those italicized in note 5, are set out in the margin,[5] and they contain the

4. (Cont'd.)

contemplate at the time that he enters into the contract, and cannot shift to the contractor the responsibility for such dangers, or for taking precautions against them. The rules stated in the two Sections have been applied more or less interchangeably in the same types of cases, and frequently have been stated in the same opinion as the same rule, or as different phases of the same rule. The rule stated in this Section is more commonly stated and applied where the employer should anticipate the need for some specific precaution, such as a railing around an excavation in the sidewalk. The rule stated in § 427 is more commonly applied where the danger involved in the work calls for a number of precautions, or involves a number of possible hazards, as in the case of blasting, or painting carried on upon a scaffold above the highway.

. . .

"d. In order for the rule stated in this Section to apply, it is not essential that the work which the contractor is employed to do be in itself an extra-hazardous or abnormally dangerous activity, or that it involve a very high degree of risk to those in the vicinity. It is sufficient that it is likely to involve a peculiar risk of physical harm unless special precautions are taken, even though the risk is not abnormally great. A 'peculiar risk' is a risk differing from the common risks to which persons in general are commonly subjected by the ordinary forms of negligence which are usual in the community. It must involve some special hazard resulting from the nature of the work done, which calls for special precautions."

Restatement (Second) of Torts § 427 provides:

"§ 427. Negligence as to Danger Inherent in the Work

"One who employs an independent contractor to do work involving a special danger to others which the employer knows or has reason to know to be inherent in or normal to the work, or which he contemplates or has reason to contemplate when making the contract, is subject to liability for physical harm caused to such others by the contractor's failure to take reasonable precautions against such danger."

5. Pertinent portions of the district court's charge follow:

"THE COURT: . . .

"The plaintiff contends that the defendant shipowner's conduct was negligent, in that the shipowner failed to exercise ordinary care, under the circumstances, to furnish the plaintiff

wording from § 416 and comments quoted in note 4. Since we have concluded that the court's jury instructions based

5. (Cont'd.)

with reasonably safe equipment, and a reasonably safe place in which to work.

"Specifically, the plaintiff claims that the defendant shipowner was negligent in one or more of the following particulars:

"In refusing to permit barrels to be removed prior to the discharge of steel;

"In having sweat batten keepers without sweat boards;

"In that the type of keeper involved constituted a trap to the plaintiff;

"In the manner of stowing the cargo. [N. T. 566-67]

. . .

"It is the shipowner's duty to warn the stevedoring company of dangers known to the shipowner which are not obvious and not known to the stevedoring company. The shipowner is not obligated to supervise the work of the independent stevedoring company in unloading the cargo.

"*But, there is an exception to the general rule: a shipowner who employs an independent contractor to do work which the shipowner should recognize as likely to create, during its progress, a peculiar risk of physical harm to others, unless special precautions are taken, is subject to liability for physical harm caused to them by the failure of the contractor to exercise reasonable care and to take such precautions, even though the shipowner has provided for such precautions in the contract or otherwise, and even though the shipowner has warned the contractor of the danger.*

"*A peculiar risk is a risk different from the common risks to which persons in general are commonly subjected by the ordinary forms of negligence which are usual in the community. It must involve some special hazard resulting from the nature of the work to be done which calls for special precautions. It is not essential that the work which the contractor is employed to do be in itself an extra hazardous or abnormally dangerous activity, or that it involve a very high degree of risk to those in the vicinity. It is sufficient that it is likely to involve a peculiar risk of physical harm unless special precautions are taken, even though the risk is not abnormally great.*

"*It is not essential that the peculiar risk be one which will necessarily and inevitably arise in the course of the work no matter how it is done. It is sufficient that it is a risk not common in the community, which the shipowner should recognize as likely to arise in the course of the ordinary and usual method*

on § 416 are inconsistent with § 905(b),[6] a new trial will be

5. (Cont'd.)

of doing work, or the particular method which the shipowner knows the contractor will adopt. [N. T. 571-72]

. . .

"The issues to be determined by the jury in this case, as between the plaintiff and the defendant shipowner, Ivarans Rederi Steamship Company, on the negligence claim, are these:

"First: Was the shipowner negligent in one or more of the particulars alleged?

"If your unanimous answer to that question is 'no', you will return a verdict for the defendant shipowner; but if your unanimous answer is 'yes', you then have a second issue to determine, namely:

"Second: Was the negligence of the shipowner a proximate cause of any injury and damage to the plaintiff?

"If your unanimous answer to that question is 'no', you will return a verdict for the defendant shipowner; but if your unanimous answer is 'yes', then you must find the answer to a third question, namely:

"Third: Was the plaintiff guilty of some contributory negligence?" [N. T. 577-78] (Emphasis supplied.)

6. In regard to point IV of defendant's brief, it contends that a so-called "equitable credit" defense should have been applied in the case. See generally R. Coleman and W. Daley, Equitable Credit: Apportionment of Damages According to Fault in Tripartite Litigation Under the 1972 Amendments to the Longshoremen's and Harbor Workers' Compensation Act, 35 Md. L. Rev. 351 (1976). The trial judge rejected this. We note that the "equitable credit" theory appears to be inconsistent with the conclusion reached in Judge Huyett's thorough opinion in *Lucas v. "Brinknes" Schiffahrts Ges.*, 379 F. Supp. 759 (E. D. Pa. 1974), *appeal dismissed*, No. 75-1223 (3d Cir., Apr. 30, 1975), *cert. denied*, 423 U. S. 866 (1975), and that, to date, courts considering the doctrine have generally rejected it.

The defendant also contends that there was no evidence of future impairment of earning capacity, and that the verdict was excessive. Since there will be a new trial at which the evidence may be different, there is no need to meet these issues at this time. However, it would appear that, since these last issues are related to conflicting expert medical testimony at trial as provided by the parties' privately retained medical experts, this case presents appropriate circumstances for the district court to exercise its broad power under F. R. Evid. 706 to appoint its own medical expert in order to insure the availability to the jury of the most qualified

required, and it is not necessary to consider the other issues briefed by the parties.

In pertinent part, § 905(b) provides:

> "In the event of injury to a person covered under the chapter caused by the negligence of a vessel, then such person . . . may bring an action against such vessel as a third party . . . and the employer shall not be liable to the vessel for such damages directly or indirectly and any agreements or warranties to the contrary shall be void. *If such person was employed by the vessel to provide stevedoring service, no such action shall be permitted if the injury was caused by the negligence of persons engaged in providing stevedoring services to the vessel.* . . . The liability of the vessel under this section shall not be based upon the warranty of seaworthiness or a breach thereof at the time the injury occurred. The remedy provided in this subsection shall be exclusive of all other remedies against the vessel . . . ." (Emphasis supplied.)

As Judge Gibbons stated in *Griffith, supra:*

"The effect of the first clause of § 905(b) is to create . . . a new negligence third party cause of action against the vessel. The second sentence relieves the vessel from liability for negligence caused by persons

6. (Cont'd.)

medical testimony, unaffected by the source of the payment of the expert's fee. See also Local Rule 27 (E. D. Pa., effective January 1, 1970); F. Van Dusen, *A United States District Judge's View of the Impartial Medical Expert System*, 32 F. R. D. 498 (1963).

Under the terms of 33 U. S. C. § 933, it is clear that the injured longshoreman or his estate, as the case may be, cannot retain both a jury verdict against the ship in an action under § 905(b) and the compensation payable under 33 U. S. C. § 904. See *Johnson v. Sword Line, Inc.*, 257 F. 2d 541, 546 (3d Cir. 1958); *The Etna*, 138 F. 2d 37, 41 (3d Cir. 1943); 1A Benedict on Admiralty § 29 (7th ed. rev., 1973 release); G. Gilmore and C. Black, Law of Admiralty (2d ed. 1975), note 336 at page 437.

engaged in providing stevedoring services, *thus preventing the imposition of liability on the vessel on some respondeat superior* or absolute duty of care basis."

Id. at 40 (emphasis suppled) (footnote omitted). The conclusion of the *Griffith* court contrasts sharply with the Restatement's view of the theoretical basis underlying § 416, as follows:

> "HARM CAUSED BY NEGLIGENCE OF A CAREFULLY SELECTED INDEPENDENT CONTRACTOR
>
> "Introductory Note: The rules stated in the following §§ 416-429, unlike those stated in the preceding §§ 410-415, do not rest upon any personal negligence of the employer. They are rules of vicarious liability, making the employer liable for the negligence of the independent contractor, irrespective of whether the employer has himself been at fault. *They arise in situations in which, for reasons of policy, the employer is not permitted to shift the responsibility for the proper conduct of the work to the contractor.* The liability imposed is closely analogous to that of a master for the negligence of his servant.
>
> "The statement commonly made in such cases is that the employer is under a duty which he is not free to delegate to the contractor. Such a 'non-delegable duty' requires the person upon whom it is imposed to answer for it that care is exercised by anyone, even though he be an independent contractor, to whom the performance of the duty is entrusted. Such duties have been recognized in a series of exceptions to the 'general rule' of non-liability stated in § 409, which are stated in the following Sections in this Topic."

Restatement (Second) of Torts at 394 (emphasis supplied). However, express language in the statute and the

legislative reports accompany the 1972 Amendments amply demonstrate that for reasons of policy the major responsibility for the proper and safe conduct of the work was to be borne by the stevedore.[6a] For instance, § 941(a), retained from the older Act, provides:

> "Every employer shall furnish and maintain employment and places of employment which shall be reasonably safe for his employees in all employments covered by this chapter and shall install, furnish, maintain, and use such devices and safeguards with particular reference to equipment used by and working conditions established by such employers as the Secretary may determine by regulation or order to be reasonably necessary to protect the life, health, and safety of such employees, and to render safe such employment and places of employment and to prevent injury to his employees."[7]

33 U. S. C. § 941(a) (1970).

6a. Although the stevedore has this duty specifically mandated by Congress, the legislative history of P. L. 92-576 indicates, by the following wording, that the shipowner would have a duty to use reasonable care to provide a safe place to work under appropriate circumstances contemplated by § 905(b), as amended:

> "Permitting actions against the vessel based on negligence will meet the objective of encouraging safety because the vessel will still be required to exercise the same care as a land-based person in providing a safe place to work. Thus, nothing in this bill is intended to derogate from the vessel's responsibility to take appropriate corrective action where it knows or should have known about a dangerous condition."

House Committee Report No. 92-1441 (Vol. 3, 1972 U. S. Code Cong. & Admin. News 4704).

See 1A Benedict on Admiralty, *supra*, § 114, at pp. 6-12 to 6-15.

7. The term "employer" is defined by the definition of "employees" covered under the Act. As Judge Gibbons recently noted in *Sea-Land v. Johns*, No. 75-2039 (3d Cir., Aug. 5, 1976):

> "Prior to 1972 the term 'employee' was defined in § 2(3) of the LHWCA, 33 U. S. C. § 902(3) only negatively:

The Senate Report demonstrates the Congress was aware of the effective focus of § 941(a) when it enacted the 1972 Amendments. As stated in that report:

> "It is important to note that adequate workmen's compensation benefits are not only essential to meeting the needs of the injured employee and his family,

7. (Cont'd.)

> 'The term "employee" does not include a master or member of a crew of any vessel, nor any person engaged by the master to load or unload or repair any small vessel under eighteen tons net.'

The scope of the Act's affirmative coverage was derived from the definition of 'employer' in § 2(4), and the 'coverage' provision in § 3(a). An 'employer' was described as an employer of persons 'employed in maritime employment, in whole or in part, upon the navigable waters of the United States (including any dry dock).' 33 U. S. C. § 902(4). . . .

. . . .

"Of concern for purposes of this case are the revised definitions of 'employer,' § 2(3), and 'employee,' § 2(4), and the revised 'coverage' provision of § 3(a). In place of the merely negative definition of 'employee' given by the 1927 Act (which excluded crew members), Congress substituted the following language:

> 'The term "employee" means any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harborworker including a ship repairman, shipbuilder, and shipbreaker, but such term does not include a master or member of a crew of any vessel, or any person engaged by the master to load or unload or repair any small vessel under eighteen tons net.'

33 U. S. C. § 902(3).

"Thus the exclusion of crew members was retained, but an affirmative listing of occupations functionally related to the maritime transportation industry was added. For this case the key words are 'longshoreman or other person engaged in longshoring operations.'

"The 1972 amendments also changed the 'employer' definition by omitting the limitation 'upon the navigable waters of the United States' and substituting

> 'The term "employer" means an employer any of whose employees are employed in maritime employment,

> but, by assuring that the employer bears the cost of unsafe conditions, serve to strengthen the employer's incentive to provide the fullest measure of on-the-job safety.
>
> "This consideration is particularly crucial with respect to high-risk occupations such as those covered by this Act. Longshoring, for example, has an injury frequency rate which is well over four times the average for manufacturing operations. It is the Committee's view that every appropriate means be applied toward improving the tragic and intolerable conditions which take such a heavy toll upon workers' lives and bodies in this industry, and such means clearly include vigorous enforcement of the Maritime Safety Amendments of 1958 and the Occupational Safety and Health Act of 1970, as well as a workmen's compensation system which maximizes industry's motivation to bring about such an improvement."

Senate Report No. 92-1125, 92d Cong., 2d Sess., 2 (1972).

These authorities highlight the principal shortcoming of § 416 as a basis of imposing liability on the shipowner: it contravenes the express statutory purpose of § 905(b) by imposing vicarious liability on the shipowner for the negligent conduct of the stevedore or the stevedore's employees. The plaintiff admits as much in his brief, but asserts that the error in basing the charge on the wording of § 416 was harmless because the plaintiff's proofs showed that the

7. (Cont'd.)

> in whole or in part upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway or other adjoining area customarily used by an employer in loading, unloading, repairing, or building a vessel).

33 U. S. C. § 902(4)."

Id. at 4-7.

vessel owner was at fault and "had scienter" (plaintiff's brief at 20). These assertions do not advance the plaintiff's position since, even if the jury disbelieved the plaintiff's witnesses under the instruction as given,[8] they could still have held the defendant liable on the basis of the inaccurate statement of law in the charge. As this court has recently stated:

> "[2, 3] It is the responsibility of the trial judge to provide the jury with a clear and accurate statement of the law it is expected to apply in reaching its verdict. . . . As long as the instructions 'show no tendency to confuse or mislead the jury,' an appellate court will presume that the jury's verdict was reached in accordance with the law.
>
> "*McPhee v. Reichel*, 461 F. 2d 947, 950-51 (3d Cir. 1972). The jury must be able to 'intelligently determine the questions presented.' *Delancey v. Motichek Towing Service Inc.*, 427 F. 2d 897, 902 (5th Cir. 1970)."

Hunziker v. Scheidemantle, Nos. 74-2236, 75-2152/53 (3d Cir., September 8, 1976) at 15.

Under the facts of this case, we hold that this standard has not been met.

Finally, the plaintiff contends that because Pennsylvania was the state of the plaintiff's employment and injuries, Pennsylvania third party tort concepts ought to form the appropriate reference for § 905(b) liability in this case. This last argument is based upon two assumptions: first, that failure to incorporate the state standards into the case is unjustified because longshoremen would then have fewer rights than workers injured on land, and, second, that the standard of uniformity expressed in the congressional reports accompanying the 1972 Amendments "deals with the essential features of the Maritime Law such as assumption of the risk and contributory negligence, and does not require an absolute uniformity." See page 2, plaintiff's letter of 9/17/76.

8. See footnote 5, *supra*.

As noted by Judge Gibbons in *Griffith, supra* at note 21:

> "The House Report states:
>
> 'Under this standard, as adopted by the Committee, there will, of course, be disputes as to whether the vessel was negligent in a particular case. Such issues can only be resolved through the application of accepted principles of tort law and the ordinary process of litigation—just as they are in cases involving alleged negligence by land-based third parties. The Committee intends that on the one hand an employee injured on board a vessel shall be in no less favorable position vis a vis his rights against the vessel as a third party than is an employee who is injured on land, and on the other hand, that the vessel shall not be liable as a third party unless it is proven to have acted or have failed to act in a negligent manner such as would render a land-based third party in non-maritime pursuits liable under similar circumstances.
>
> . . .
>
> *'Finally, the Committee does not intend that the negligence remedy authorized in the bill shall be applied differently in different ports depending on the law of the State in which the port may be located. The Committee intends that legal questions which may arise in actions brought under these provisions of the law shall be determined as a matter of Federal law.*

> In that connection, the Committee intends that the admiralty concept of comparative negligence, rather than the common law rule as to contributory negligence, shall apply in cases where the injured employee's own negligence may have contributed to causing the injury. Also, the Committee intends that the admiralty rule which precludes the defense of "assumption of risk" in an action by an injured employee shall also be applicable.'
>
> 3 U. S. Code Cong. & Admin. News, pp. 4704, 4705 (1972)" (Emphasis supplied.)

The above italicized language from the House Report indicates that Congress wished a uniform federal law, as opposed to the varying negligence concepts in the areas where accidents occur, to govern liability of the shipowner under § 905(b). See *Southern Pacific v. Jensen*, 244 U. S. 205, 215-17 (1917), where the Supreme Court said:

> "Congress has paramount power to fix and determine the maritime law which shall prevail throughout the country. *Butler v. Boston & Savannah Steamship Co.*, 130 U. S. 527; *In re Garnett*, 141 U. S. 1, 14. And further, that in the absence of some controlling statute the general maritime law as accepted by the federal courts constitutes part of our national law applicable to matters within the admiralty and martime jurisdiction. *The Lottawanna*, 21 Wall. 588; *Butler v. Boston & Savannah Steamship Co.*, 130 U. S. 527, 557; *Workman v. New York City*, 179 U. S. 552.
>
> "In *The Lottawanna*, Mr. Justice Bradley speaking for the court said: 'That we have a maritime law of our own, operative throughout the United States, cannot be doubted. The general system of maritime law which was familiar to the lawyers and statesmen of the country when the Constitution was adopted, was most certainly intended and referred to when it was declared in that instrument that the judicial power of the United States shall extend "to all cases of admiralty and maritime jurisdiction." . . . One thing, however, is unquestionable; the Constitution must have referred to a system of law coextensive with, and operating uniformly in, the whole country. It certainly could not have been intended to place the rules and limits of maritime law under the disposal and regulation of the several States, as that would have defeated the uniformity and consistency at which the Constitution aimed on all subjects of a commercial character affecting the intercourse of the States with each other or with foreign states.'
>
> "By § 9, Judiciary Act of 1789, 1 Stat. 76, 77, the District Courts of the United States were given 'exclusive original cognizance of all civil causes of admiralty and maritime jurisdiction; . . . saving to suitors, in all cases, the right of common law remedy, where the common law is competent to give it.' And this grant has been continued. Judicial Code, §§ 24 and 256.
>
> "In view of these constitutional provisions and the federal act it would be difficult, if not impossible, to define with exactness just how far the general maritime law may be changed, modified, or affected by state legislation. That this may be done to some extent cannot be denied. A lien upon a vessel for repairs in her own port may be given by state statute, *The Lottawanna*, 21 Wall. 558, 579, 580; *The J. E. Rumbell*, 148 U. S. 1; pilotage fees fixed, *Cooley v. Board*

of Wardens, 12 How. 299; *Ex parte McNiel,* 13 Wall. 236, 242; and the right given to recover in death cases, *The Hamilton,* 207 U. S. 398; *La Bourgogne,* 210 U. S. 95, 138. See *The City of Norwalk,* 55 Fed. Rep. 98, 106. Equally well established is the rule that state statutes may not contravene an applicable act of Congress or affect the general maritime law beyond certain limits. They cannot authorize proceedings *in rem* according to the course in admiralty, *The Moses Taylor,* 4 Wall. 411; *Steamboat Co. v. Chase,* 16 Wall. 522, 534; *The Glide,* 167 U. S. 606; nor create liens for materials used in repairing a foreign ship, *The Roanoke,* 189 U. S. 185. See *Workman v. New York City,* 179 U. S. 552. And plainly, we think, no such legislation is valid if it contravenes the essential purpose expressed by an act of Congress or works material prejudice to the characteristic features of the general maritime law or interferes with the proper harmony and uniformity of that law in its international and interstate relations. This limitation, at the least is essential to the effective operation of the fundamental purposes for which such law was incorporated into our national laws by the Constitution itself. These purposes are forcefully indicated in the foregoing quotations from *The Lottawanna.*"

. . .

"The work of a stevedore in which the deceased was engaging is maritime in its nature; his employment was a maritime contract; the injuries which he received were likewise maritime; and the rights and liabilities of the parties in connection therewith were matters clearly within the admiralty jurisdiction. *Atlantic Transport Co. v. Imbrovek,* 234 U. S. 52, 59, 60."

III. The Standard of Care

The parties in this case would have us suggest to the district court the standard of care a vessel owes to a longshoreman under the negligence remedy created by § 905(b). It would appear that the principles of the law of negligence, as adopted in the admiralty field during the history of our country, are to form the basis of any recovery against shipowners insofar as such principles are not inconsistent with § 905(b).[9] See, *e.g., Kermarec, supra* at 628; *Socony-Vacuum Co. v. Smith,* 305 U. S. 424, 431-32 (1939); *Jensen, supra;* see also, for example, *Bess v. Agromar Line,* 518 F. 2d 738, 740-43 (4th Cir. 1975); §§ 281-83, as well as 302A, 305 and 452, Restatement (Second) of Torts, in light of the regulations set forth in note 3 and the text at page 4 above.[10]

The judgment in favor of Brown and against Ivarans Rederi A/S will be reversed and the case will be remanded for further proceedings consistent with this opinion.

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9. As the Supreme Court stated in *Kermarec v. Compagnie General Transatlantique,* 358 U. S. 625, 630-32 (1959):

> "The issue must be decided in the performance of the Court's function in declaring the general maritime law, free from inappropriate common-law concepts. *The Lottawanna,* 21 Wall. 558; *The Max Morris,* 137 U. S. 1.[5] . . .
>
> . . .
>
> "We hold that the owner of a ship in navigable waters owes to all who are on board for purposes not inimical to his legitimate interests the duty of exercising reasonable care under the circumstances of each case.
>
> "5. Where there is no impingement upon legislative policy. Cf. *United States v. Atlantic Mut. Ins. Co.,* 343 U. S. 236; *Halcyon Lines v. Haenn Ship Corp.,* 342 U. S. 282."

10. Since *Napoli v.* [*Transpacific Carriers, etc.*] *Hellenic Lines,* 536 F. 2d 505 (2d Cir. 1976), cited during oral argument, (1) relied on § 343A of the Restatement (Second) of Torts (page 508 of 536 F. 2d), which in comment (e) is based on the doctrine of assumption of risk specifically rejected by Congress in the 1972 legislation (see page 14 above), and (2) the vessel owner acted as its own stevedore in that case, we do not find it persuasive on the facts presented by this appeal.

COURT OF APPEALS JUDGMENT.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 76-1037.

THOMAS BROWN

v.

IVARANS REDERI A/S,

Appellant.

(D. C. Civil Action No. 74-2952)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Present: VAN DUSEN, HUNTER and WEIS, *Circuit Judges.*

Judgment

This cause came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgments of the said District Court, filed September 18, 1975, and November 7, 1975, be, and the same are hereby reversed and the cause is remanded for further proceedings consistent with the opinion of this Court. Costs taxed against the appellee.

ATTEST:

THOMAS F. QUINN,
Clerk.

November 4, 1976.

COURT OF APPEALS ORDER.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 76-1037.

THOMAS BROWN

v.

IVARANS REDERI A/S,

Appellant.

(D. C. Civil No. 74-2952)

Sur Petition For Rehearing

Present: SEITZ, *Chief Judge,* and VAN DUSEN, ALDISERT, ADAMS, GIBBONS, ROSENN, HUNTER, WEIS and GARTH, *Circuit Judges.*

The petition for rehearing filed by appellee in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By THE COURT,

VAN DUSEN,
Judge.

Dated: November 29, 1976.

USCA(5) OPINION IN GAY v. OCEAN TRANSPORT.

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT.

Nos. 75-2729 and 75-2441.

Roosevelt GAY and Florence Gay, his wife, Plaintiffs-Appellants,

v.

OCEAN TRANSPORT & TRADING, LTD., Defendant-Appellee,

Argonaut Insurance Company, a Foreign Corp., Intervenor.

Elias G. GUERRA, Plaintiff-Appellant,

v.

BULK TRANSPORT CORP. et al., Defendants-Appellees,

v.

Texas Employers' Insurance Association, Intervenor-Appellant.

OPINION OF THE COURT.
Feb. 11, 1977.

Appeal from the United States District Court for the Southern District of Florida.

Appeals from the United States District Court for the Southern District of Texas.

Before COLEMAN, CLARK and TJOFLAT, *Circuit Judges.*

TJOFLAT, *Circuit Judge:*

In each of these two cases a longshoreman in the employ of an independent stevedore sued the vessel on which he was working when injured. The cases present a common question: What standard of negligence is to be applied in suits brought against vessels under the amended Longshoremen's and Harbor Workers' Compensation Act (LHWCA), 33 U. S. C. § 901 *et seq.* (Supp. II 1972)? The parties and several amicus curiae have briefed this issue in a commendably comprehensive and articulate fashion. We will, therefore, first elaborate the standards we find appropriate in cases where a vessel is sued by an injured employee, and then we will apply those standards to the cases before us.

I.

When Congress undertook revision of the LHWCA in 1972, it was faced with the problem of what to do about the judicial undermining of the exclusive liability provision for employers.[1] Under *Seas Shipping Co. v. Sieracki,* 328 U. S. 85, 66 S. Ct. 872, 90 L. Ed. 1099 (1946), and *Ryan Stevedoring Co. v. Pan Atlantic Steamship Corp.,* 350 U. S. 124, 76 S. Ct. 232, 100 L. Ed. 133 (1956), the employee could sue the vessel for unseaworthiness and the vessel could then demand indemnity from the stevedore/employer on the theory that it had breached an express or implied warranty of workmanlike performance to the

1. Act of March 4, 1927, ch. 509, § 5, 44 Stat. 1425, *now codified at* 33 U. S. C. § 905(a) (Supp. II 1972):

> The liability of an employer . . . shall be exclusive and in place of all other liability of such employer to the employee, his legal representative, husband or wife, parents, dependents, next of kin, and anyone otherwise entitled to recover damages from such employer at law or in admiralty on account of such injury or death.

vessel.[2] The solution selected was to improve compensation benefits while at the same time making a vessel liable only for its own negligence rather than for unseaworthiness.[3] To effect this result, section 905(b) was added to the Act:

> In the event of injury to a person covered under this chapter caused by the negligence of a vessel, then such person, or anyone otherwise entitled to recover damages by reason thereof, may bring an action against such vessel as a third party in accordance with the provisions of section 933 of this title and the employer shall not be liable to the vessel for such damages directly or indirectly and any agreements or warranties to the contrary shall be void. If such person was employed by the vessel to provide stevedoring services, no such action shall be permitted if the injury was caused by the negligence of persons engaged in providing stevedoring services to the vessel. If such person was employed by the vessel to provide ship building or repair services, no such action shall be permitted if the injury was caused by the negligence of persons engaged in providing ship building or repair services to the vessel. The liability of the vessel under this subsection shall not be based upon the warranty of seaworthiness or a breach thereof at the time the injury occurred. The remedy provided in this subsection shall be exclusive of all other remedies against the vessel except remedies available under this chapter.[4]

2. *See generally Smith v. M/S Captain Fred*, — F. 2d —, No. 75-1910 (5th Cir. Jan. 28, 1977); H. R. Rep. No. 1441, 92d Cong., 2d Sess., *reprinted in* [1972] U. S. Code Cong. & Ad. News pp. 4698, 4702.

3. The House Report put it in these words:

> Accordingly, the Committee has concluded that, given the improvement in compensation benefits which this bill would provide, it would be fairer to all concerned and fully consistent with the objective of protecting the health and safety of employees who work on board vessels for the liability of vessels as third parties to be predicated on negligence, rather than the no-fault concept of seaworthiness. H. R. Rep. No. 1441, 92d Cong., 2d Sess., *reprinted in* [1972] U. S. Code Cong. & Ad. News pp. 4698, 4703.

Our task here is to flesh out what Congress intended by its use of the phrase "negligence of the vessel". For assistance we turn to the House Report and quote at some length.

> The Committee believes that where a longshoreman or other worker covered under this Act is injured through the fault of the vessel, the vessel should be liable for damages as a third party, just as land-based third parties in non-maritime pursuits are liable for damages when, through their fault, a worker is injured.
>
> * * *
>
> . . . This would place vessels in the same position, insofar as third party liability is concerned, as land-based third parties in non-maritime pursuits.
>
> The purpose of the amendments is to place an employee injured aboard a vessel in the same position he would be if he were injured in non-maritime employment ashore, insofar as bringing a third party damage action is concerned, and not to endow him with any special maritime theory of liability or cause

4. 33 U. S. C. § 905(b) (Supp. II 1972). For discussions of the 1972 Amendments to the LHWCA and their effect, *see generally Landon v. Lief Hoegh & Co.*, 521 F. 2d 756 (2d Cir. 1975), *cert. denied, A/S Arcadia v. Gulf Ins. Co.*, 423 U. S. 1053, 96 S. Ct. 783, 46 L. Ed. 2d 642 (1976); *Griffith v. Wheeling Pittsburgh Steel Corp.*, 521 F. 2d 31 (3d Cir. 1975), *cert. denied*, 423 U. S. 1054, 96 S. Ct. 785, 46 L. Ed. 2d 643 (1976); *Croshaw v. Koninklijke Nedlloyd, B. V. Rijswijk*, 398 F. Supp. 1224 (D. Or. 1975); *Ramirez v. Toko Kaiun*, 385 F. Supp. 644 (N. D. Cal. 1974); *Lucas v. "Brinknes" Schiffahrts Ges.*, 379 F. Supp. 759 (E. D. Pa. 1974).

of action under whatever judicial nomenclature it may be called, such as "unseaworthiness", "non-delegable duty", or the like.

• • •

Permitting actions against the vessel based on negligence will meet the objective of encouraging safety because the vessel will still be required to exercise the same care as a land-based person in providing a safe place to work. Thus, nothing in this bill is intended to derogate from the vessel's responsibility to take appropriate corrective action where it knows or should have known about a dangerous condition.

• • •

Under this standard, as adopted by the Committee, there will, of course, be disputes as to whether the vessel was negligent in a particular case. Such issues can only be resolved through the application of accepted principles of tort law and the ordinary process of litigation—just as they are in cases involving alleged negligence by land-based third parties. The Committee intends that on the one hand an employee injured on board a vessel shall be in no less favorable position vis a vis his rights against the vessel as a third party than is an employee who is injured on land, and on the other hand, that the vessel shall not be liable as a third party unless it is proven to have acted or have failed to act in a negligent manner such as would render a land-based third party in non-maritime pursuits liable under similar circumstances.

• • •

Finally, the Committee does not intend that the negligence remedy authorized in the bill shall be applied differently in different ports depending on the law of the State in which the port may be located.

The Committee intends that legal questions which may arise in actions brought under these provisions of the law be determined as a matter of Federal law. In that connection, the Committee intends that the admiralty concept of comparative negligence, rather than the common law rule as to contributory negligence, shall apply in cases where the injured employee's negligence may have contributed to causing the injury. Also, the Committee intends that the admiralty rule which precludes the defense of "assumption of risk" in an action by an injured employee shall also be applicable.[5]

From these passages and section 905(b) itself we distill the following conclusions:

(1) Congress intends for the federal courts to develop a uniform federal common law to control LHWCA suits against vessels.[6]

(2) That LHWCA federal common law is to be based on negligence concepts; the unseaworthiness of a vessel is not an acceptable ground for relief.

(3) LHWCA negligence law is to be guided primarily by analogy to land-based law concepts.[7] The

5. H. R. Rep. No. 1441, 92d Cong., 2d Sess., *reprinted in* [1972] U. S. Code Cong. & Ad. News pp. 4698, 4702-05.

6. *Cf. Moragne v. States Marine Lines*, 398 U. S. 375, 90 S. Ct. 1772, 26 L. Ed. 2d 339 (1970) (uniform federal law to be applied in LHWCA actions); *Pope & Talbot, Inc. v. Hawn*, 346 U. S. 406, 74 S. Ct. 202, 98 L. Ed. 143 (1953); *Robins Drydock & Repair Co. v. Dahl*, 266 U. S. 449, 457, 45 S. Ct. 157, 69 L. Ed. 372 (1925); *So. Pac. Co. v. Jensen*, 244 U. S. 205, 215, 37 S. Ct. 524, 61 L. Ed. 1086 (1917); *Branch v. Schumann*, 445 F. 2d 175, 178 (5th Cir. 1971).

7. In *Brock v. Coral Drilling, Inc.*, 477 F. 2d 211 (5th Cir. 1973), we stated in dicta that section 905(b) places the shipowner, "in so far as third party liability is concerned, in the same position as land-based third parties in non-maritime pursuits." *Id.* at 213 n. 1. Even a cursory examination of the legislative history demonstrates that the *Brock* court was correct. Moreover, the following

stevedore is to be viewed generally as an independent contractor and its employees as invitees of the vessel owner.

(4) However certain common land-based principles of state law are not to be carried over into the federal law governing LHWCA suits. Assumption of risk may not be utilized as a defense, and comparative negligence, rather than contributory negligence, is to be applied.

Our brethern in the Second and Fourth Circuits have already faced the problem before us and have agreed that land-based principles are to guide in the establishment of a federal law. *Anuszewski v. Dynamic Mariners Corp.*, 540 F. 2d 757 (4th Cir. 1976); *Napoli v. Hellenic Lines, Ltd.*, 536 F. 2d 505 (2d Cir. 1976). Moreover, those circuits have both relied upon the Restatement (Second) of Torts for guidelines. 540 F. 2d at 759; 536 F. 2d at 508-

7. (Cont'd.)
courts have applied land-based concepts of negligence in section 905(b) suits: *Anuszewski v. Dynamic Mariners Corp.*, 540 F. 2d 757 (4th Cir. 1976) (per curiam), *aff'g*, 391 F. Supp. 1143 (D. Md. 1975); *Butler v. O/Y Finnlines, Ltd.*, 537 F. 2d 1205, 1206 n. 2 (4th Cir. 1976); *Napoli v. Hellenic Lines, Ltd.*, 536 F. 2d 505 (2d Cir. 1976); *Cummings v. "Sidarma" Soc.*, 409 F. Supp. 869 (E. D. La. 1976); *Solsvik v. Maremar Compania Naviera, S. A.*, 399 F. Supp. 712 (W. D. Wash. 1975); *Croshaw v. Koninklijke Nedlloyd, B. V. Rijswijk*, 398 F. Supp. 1224 (D. Or. 1975); *Frasca v. Prudential-Grace Lines, Inc.*, 394 F. Supp. 1092 (D. Md. 1975); *Fitzgerald v. Compania Naviera La Molinera*, 394 F. Supp. 413 (E. D. La. 1975); *Jackson v. Lykes Bros. Steamship Co.*, No. B-74-38 (E. D. Tex. July 16, 1975); *Robinson v. Dixie Machine Welding & Metal Works, Inc.*, No. 74-533 (E. D. La. May 1, 1975); *Parker v. Costa Amatori S. P. A.*, No. 74-454-N (E. D. Va. April 23, 1975); *Johnson v. Zenith Navigation*, No. 74-1502 (E. D. La. Feb. 12, 1975); *Slaughter v. S. S. Ronde*, 390 F. Supp. 637 (S. D. Ga. 1974), *aff'd per curiam*, 509 F. 2d 973 (5th Cir. 1975); *Birrer v. Flota Mercante Grancolombiana*, 386 F. Supp. 1105 (D. Or. 1974); *Ramirez v. Toko Kaiun K. K.*, 385 F. Supp. 644 (N. D. Cal. 1974); *Citizen v. M/V Triton*, 384 F. Supp. 198 (E. D. Tex. 1974); *Fedison v. Vessel Wislica*, 382 F. Supp. 4 (E. D. La. 1974); *Hite v. Maritime Overseas Corp.*, 380 F. Supp. 222 (E. D. Tex. 1974); *Lucas v. "Brinknes" Schiffahrts Ges.*, 379 F. Supp. 759 (E. D. Pa. 1974).

09. In the interest of fulfilling the Congressional desire of uniformity, we, too, adopt the Restatement formulation. Restatement (Second) of Torts § 342 (1965) provides,

> A possessor of land is subject to liability for physical harm caused to licensees by a condition on the land if, but only if,
>
> (a) the possessor knows or has reason to know of the condition and should realize that it involves an unreasonable risk of harm to such licensees, and should expect that they will not discover or realize the danger, and
>
> (b) he fails to exercise reasonable care to make the condition safe, or to warn the licensees of the condition and the risk involved, and
>
> (c) the licensees do not know or have reason to know of the condition and the risk involved.

Section 343 states,

> A possessor land is subject to liability for physical harm caused to his invitees by a condition on the land if, but only if, he
>
> (a) knows or by the exercise of reasonable care would discover the condition, and should realize that it involves an unreasonable risk of harm to such invitees, and
>
> (b) should expect that they will not discover or realize the danger, or will fail to protect themselves against it, and
>
> (c) fails to exercise reasonable care to protect them against danger.

Section 343 A continues,[8]

> (1) A possessor of land is not liable to his invitees for physical harm caused to them by any activity or condition on the land whose danger is known or obvious to them, unless the possessor should anticipate the harm despite such knowledge or obviousness.
>
> (2) In determining whether the possessor should anticipate harm from a known or obvious danger, the fact that the invitee is entitled to make use of public land, or of the facilities of a public utility, is a factor of importance indicating that the harm should be anticipated.

These general standards should be utilized in the future to assure uniformity in cases brought under section 905(b) of the LHWCA to recover for injuries caused by the negligence of the vessel. We proceed now to apply these standards to the cases before us.

II.

A. No. 75–2729.

Roosevelt Gay was employed as a longshoreman by Atlantic Stevedoring Co. On the date of his injury he was assigned to operate a propane forklift in an unventilated reefer compartment aboard the M/V Prometheus. To remove the noxious fumes emitted by the forklift, a blower was placed on board the vessel by the stevedore. Unfortunately, the air hose connected to the blower was not long enough to reach into the reefer compartment. Approximately one hour after operations began, the plaintiff and other longshoremen working with him began to feel ill. Gay was removed from the vessel and taken to a local hospital, where it was determined that he had suffered

8. Restatement (Second) of Torts § 343, comment a (1965), instructs that section 343 "should be read together with § 343 A . . . ."

carbon monoxide poisoning from the inhalation of the fumes.

Gay admits that the duty to provide a blower to remove the fumes from the compartment rested on his employer, the stevedore, and not on the vessel. He further acknowledges that the operators of the vessel had no knowledge that the dangerous condition existed. Still, they attempt to predicate a theory of possible vessel liability upon the fact that a federal regulation was violated. That regulation was violated. That regulation requires the employer to ascertain the quantity of carbon monoxide in a compartment like that in question here within thirty minutes after placement of a forklift into the compartment. 29 C. F. R. § 1918.93(a)(1)(i) (1976). This was not done by Gay's employer. Gay argues, however, that this regulation can provide the standard of care for a negligence action against the vessel.

We disagree. The vessel had no similar duty to check the carbon monoxide content of the compartment.[9] Gay's argument is, in effect, that the vessel has a non-delegable duty to provide a longshoreman with a safe place to work. But this is exactly the type of liability without fault concept from which Congress sought to free vessels to the passage

9. 29 C. F. R. § 1918.2(b) (1976) makes clear that the regulation only applies to employers and not vessels:

> It is not the intent of the regulations of this part to place additional responsibilities or duties on owners, operators, agents or masters of vessels unless such persons are acting as employers, nor is it the intent of those regulations to relieve such owners, operators, agents or masters of vessels from responsibilities or duties now placed upon them by law, regulation or custom.

Even under the pre-1972 LHWCA, the general principle was that "liability for failure to comply with safety regulations should be imposed on the party exposing the injured employee to the dangerous condition." *Brock v. Coral Drilling, Inc.*, 477 F. 2d 211, 215 (5th Cir. 1973). *See also Burrage v. Flota Mercante Grancolombiana*, 431 F. 2d 1229 (5th Cir. 1970).

of the 1972 Amendments.[10] *Napoli*, 536 F. 2d at 507; *Bess v. Agromar Line*, 518 F. 2d 738 (4th Cir. 1975); *Solsvik v. Maremar Compania Naviera, S. A.*, 399 F. Supp. 712 (W. D. Wash. 1975); H. R. Rep. No. 1441, 92d Cong., 2d Sess., *reprinted in* [1972] U. S. Code Cong. & Ad. News pp. 4698, 4703. Section 905(b) instructs that a longshoreman does not have a cause of action against a vessel if his injury "was caused by the negligence of persons engaged in providing stevedoring services to the vessel." Such is the case here. Since the district court granted summary judgment for the vessel, that judgment must be affirmed.

B. No. 75–2441.

Elias Guerra worked as a longshoreman for the Shippers Stevedoring Co. (Shippers). Shippers was hired to unload steel, varying in length from forty to sixty-five feet, from the vessel M/V Lyra. In order to remove the steel

10. In *Teofilovich v. D'Amico Mediterranean/Pacific Line*, 415 F. Supp. 732 (C. D. Cal. 1976), the court refused to apply Restatement (Second) of Torts §§ 413 & 416 (1965) to hold a shipowner vicariously liable for the negligence of the stevedore, holding that this "would do violence to the letter and policy of 33 U. S. C. § 905(b). . . . Congress specifically excluded a rule of vicarious liability, specifically excluded a rule of liability without fault and specifically excluded the concept of a non-delegable duty, all of which are the express and explicit result of section 416." 415 F. Supp. at 734-36. *See also Frasca v. Prudential-Grace Lines, Inc.*, 394 F. Supp. 1092 (D. Md. 1975); *Anuszewski v. Dynamic Mariners Corp.*, 391 F. Supp. 1143, 1145 (D. Md. 1975), *aff'd*, 540 F. 2d 757 (4th Cir. 1976) (per curiam); *Lucas v. "Brinknes" Schiffahrts Ges.*, 379 F. Supp. 759 (E. D. Pa. 1974).

We repeat at this point the admonition of the House Report that "nothing in this bill is intended to derogate from the vessel's responsibility to take appropriate corrective action where it knows or should have known about a dangerous condition." H. R. Rep. No. 1441, 92d Cong. 2d Sess., *reprinted in* [1972] U. S. Code Cong. & Ad. News pp. 4698, 4704. *See also West v. United States*, 361 U. S. 118, 123, 80 S. Ct. 189, 4 L. Ed. 2d 161 (1959); *Marant v. Farrell Lines, Inc.*, No. 73-2615 (E. D. Pa. Jan. 15, 1976); *Solsvik v. Maremar Compania Naviera, S. A.*, 399 F. Supp. 712 (W. D. Wash. 1975); *Frasca*, 394 F. Supp. at 1098. It is uncontroverted here, however, that the vessel did not have either actual or constructive knowledge of the dangerous carbon monoxide level.

from its compartment, the ship's boom, operated by an employee of the stevedore, was first used to raise the steel enough to get wooden blocks underneath it. Then the boom was swung out of the way so that an on-shore crane and chains could be brought into the hold to remove the steel. The accident occurred when the ship's boom was swinging into position over the hold. The boom's breakout wire snagged on a 125-pound pallet which was stacked by the hatch coaming, causing it to fall about thirty feet into the hold and strike Guerra on the back of the head and right shoulder.

The pallets had been transported on top of the steel in the holds, and so prior to unloading they had had to be removed. This task was performed by the stevedore, and Shippers stacked them next to the hatch coaming after being informed by crew members that they could not be placed on the dock. Although the hazardous condition was readily apparent and brought to the attention of the supervisory personnel of Shippers by its longshoremen, the pallets were not removed or tied down to prevent what foreseeably occurred. After a bench trial, the district court found that Shippers had been negligent in creating the dangerous condition, in failing to correct it and in its operation of the ship's cargo boom. The court found no negligence on the part of the vessel but did determine that the danger was open and obvious and as well known to the shipowner as it was to the stevedore. Applying land-based negligence concepts, the court concluded that the "shipowner was under no duty to warn the independent stevedoring contractor or his employees, including the plaintiff, of the open and obvious danger which the independent contractor created aboard the vessel and which was admittedly known and appreciated by the independent contractor's employees, including the plaintiff." Appendix at 125.

We hold that the district court had ample evidence to support his findings of fact and, hence, that they are not clearly erroneous. The court was also correct in adopting land-based negligence principles to decide this case, as we have already explained. It is clear that the vessel has no liability under section 905(b) since the sole cause of injury was the negligence of the stevedore.[11]

Comment need be made, however, about the possible intimation of the holding of the district court that a vessel has no duty concerning any danger which is open and obvious to the stevedore or its employees.[12] This indeed has been the traditional rule concerning owners of land and their invitees,[13] and it has been applied in several suits brought under section 905(b).[14] The traditional rule's appropriateness in LHWCA suits has been rejected by several courts, however,[15] for two cogent reasons.

11. We have recently explained that in all tort cases, be they strict liability or ordinary negligence cases, causation must be established before recovery will be allowed. *Higginbotham v. Mobil Oil Corp.*, 545 F. 2d 422 (5th Cir. 1977).

12. We do not intend to fault the district court. It noted the open and obvious nature of the danger, but did not hold that that fact, operating alone, relieved the vessel of liability. Instead, Restatement (Second) of Torts § 343 A (1965), the appropriate guideline, was cited and, as we shall note in the text *infra*, appropriately applied. *See* Appendix at 126.

13. The traditional rule is found in Restatement of Torts § 340 (1934): "A possessor of land is not subject to liability to his licensees, whether business visitors or gratuitous licensees, for bodily harm caused to them by any dangerous condition thereon, whether natural or artificial, if they know of the condition and realize the risk involved therein." Cases applying the traditional rule are collected in Annot., 35 A. L. R. 3d 230, 244-53 (1971).

14. *See, e.g., Cummings v. "Sidarma" Soc.*, 409 F. Supp. 869 (E. D. La. 1976); *Robinson v. Dixie Machine Welding & Metal Works, Inc.*, No. 74-533 (E. D. La. May 1, 1975); *Fedison v. Vessel Wislica*, 382 F. Supp. 4 (E. D. La. 1974); *Hite v. Maritime Overseas Corp.*, 380 F. Supp. 222 (E. D. Tex. 1974). *See also Ramirez v. Toko Kaiun K. K.*, 385 F. Supp. 644 (N. D. Cal. 1974).

15. *See, e.g., Napoli v. Hellenic Lines*, 536 F. 2d 505 (2d Cir. 1976); *Croshaw v. Koninklijke Nedlloyd, B. V. Rijswijk*, 398 F. Supp. 1224 (D. Or. 1975); *Frasca v. Prudential-Grace Lines, Inc.*, 394 F. Supp. 1092 (D. Md. 1975).

First, the traditional rule has increasingly given way in recent years to the view that the obviousness or knowledge of a dangerous condition on certain property does not necessarily relieve the owner of his obligation to take further precautions to remedy the danger.[16] This modern trend has been reflected in section 343 A of the Restatement (Second) of Torts, which we adopted *supra*. We agree with the Second Circuit that "[a]lthough the invitee (or in this case the employee) may be under a duty to avoid harm likely to result to him from open and obvious dangers, he may not be in a position fully to appreciate the risk or to avoid the danger even though aware of it."[17] *Napoli*, 536 F. 2d at 508.

16. *See generally* Annot., *supra* note 13, at 254-62.

17. Dean Prosser in his treatise gives a more elaborate explanation of the modern rule:

> Likewise, in the usual case, there is no obligation to protect the invitee against dangers which are known to him, or which are so obvious and apparent to him that he may reasonably be expected to discover them. Against such conditions it may normally be expected that the visitor will protect himself. It is for this reason that it is so frequently held that reasonable care requires nothing more than a warning of the danger. But this is certainly not a fixed rule, and all of the circumstances must be taken into account. In any case where the occupier, as a reasonable man, should anticipate an unreasonable risk of harm to the invitee notwithstanding his knowledge, warning, or the obvious nature of the condition, something more in the way of precautions may be required. This is true, for example, where there is reason to expect that the invitee's attention will be distracted, as by goods on display, or that after lapse of time he may forget the existence of the condition, even though he has discovered it or been warned; or where the condition is one which would not reasonably be expected, and for some reason, such as an arm full of bundles, it may be anticipated that the visitor will not be looking for it. It is true also where the condition is one such as icy steps, which cannot be negotiated with reasonable safety even though the invitee is fully aware of it, and, because the premises are

The more telling criticism of the traditional rule, however, is that it is premised in large part on the concepts of contributory negligence and assumption of risk.[18] As previously recounted, both of these concepts are inappropriate in section 905(b) cases. It would be wholly improper, then, indirectly to introduce these principles into LHWCA suits by adopting the traditional rule that if a hazard is

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17. (Cont'd.)

held open to him for his use, it is to be expected that he will nevertheless proceed to encounter it. In all such cases the jury may be permitted to find that obviousness, warning or even knowledge is not enough. W. Prosser, The Law of Torts § 61, at 394-95 (4th ed. 1971) (footnotes omitted).

In *Brock v. Coral Drilling, Inc.*, 477 F. 2d 211 (5th Cir. 1973), we recognized similar principles in a LHWCA case in which the 1972 Amendments were not applicable. In that case, the plaintiff Brock was aware of hazardous conditions existing on the vessel on which he was working, but continued to work after protests to his supervisor proved unavailing. We affirmed a finding that Brock had met the standard of ordinary prudence, noting that he was economically dependent upon the stevedore for future employment. *Id.* at 215.

18. *Napoli*, 536 F. 2d at 508; Annot., *supra* note 13, at 236, 263-65, 269-72. Illustrative of those cases holding that the obviousness of a dangerous condition is proof of contributory negligence as a matter of law is *Parvino v. Wellman's Funeral Parlors, Inc.*, 176 So. 2d 749 (La. App. 1965). In *Parvino* the court held that, even if the steps on which the plaintiff fell were wet and slippery, since he had shortly before traversed them, he was aware of their condition and was thus guilty of contributory negligence in his misadventure. *Id.* at 751. *See also Romano v. Juneau*, 198 So. 2d 499 (La. App. 1967).

An example of the traditional rule utilizing the assumption of risk rationale is *Wade v. Roberts*, 118 Ga. App. 284, 163 S. E. 2d 343 (1968). In *Wade* the plaintiff slipped and fell on a driveway over which was strewn loose gravel. The court held that "by walking thereon she assumed any risks incident thereto and was guilty of such lack of ordinary care for her own safety as would prevent a recovery." Id. at 287, 163 S. E. 2d at 345. *See also Rogers v. Atlanta Enterprises, Inc.*, 89 Ga. App. 903, 81 S. E. 2d 721 (1954); *Bradley v. Delph Nor-Tex Hide Co.*, 428 S. W. 2d 481 (Tex. Civ. App. 1968).

open and obvious that fact alone absolves the owner of his negligence.[19]

Despite our rejection of the traditional rule, we still affirm the judgment of the district court in this case. Even though the crew of the vessel was aware of the dangerous condition presented by the stack of pallets, it was the stevedore who created the hazard in the first place and it was the stevedore that failed to tie the pallets down and then carelessly knocked one into the hold. This was not the type of danger that must be faced notwithstanding knowledge. The finding of the district court that the stevedore's negligence was the sole proximate cause of Guerra's injury is not clearly erroneous.

III.

These cases have presented for our review the issue of what standard should be applied when a vessel is sued for its negligence under section 905(b) of the LHWCA. In the interests of uniformity among the courts of this circuit and throughout the federal system, we have adopted the formulation of the Restatement (Second) of Torts §§ 342, 343 & 343 A (1965).[20] Applying those standards to the cases before us, they are both hereby AFFIRMED.

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19. Of course, that the danger is open and obvious or that the plaintiff had knowledge of the hazard will likely be highly relevant to the appropriate inquiry into the comparative negligence of the employee.

20. By adopting as guidelines the land-based principles found in the Restatement (Second) of Torts, we do not indicate, of course, that vessel owners have the identical duties of owners of land. A ship presents its own special hazards. As always, a determination of the reasonableness of a defendant's actions (or lack thereof) requires an examination of all the circumstances surrounding the injury.

USCA(3) OPINION IN MARANT v. FARRELL LINES.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 76-1383

MILTON MARANT

v.

FARRELL LINES, INC.,

Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

(D.C. Civil Action No. 73-2615)

Argued November 16, 1976

Before: VAN DUSEN, BIGGS and ALDISERT, *Circuit Judges.*

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OPINION OF THE COURT

(Filed January 31, 1977)

ALDISERT, *Circuit Judge.*

The central dispositive issue on this appeal is the question of the relative responsibility of stevedore and shipowner for longshoreman safety under the 1972 Amendments to the Longshoremen's and Harbor Workers' Compensation Act (LHWCA), 33 U.S.C. § 901 *et seq.* Marant, a longshoreman injured in unloading a cargo, brought this negligence action against Farrell Lines, the shipowner. The trial court charged the jury that stevedore and shipowner had concurrent responsibility for longshoring safety and the jury, by special verdict, found the stevedore and shipowner equally at fault in causing the injury. Damages were stipulated and judgment for the full amount was entered against Farrell. Farrell appealed. We reverse.

I.

Marant was employed as a longshoreman by the Lavino Shipping Company, an independent stevedoring contractor hired by Farrell Lines to discharge a cocoa bean cargo from its vessel, the S.S. African Moon, in Philadelphia. The beans had been loaded in Africa by African longshoremen under the supervision of the vessel's officers and, although the testimony was disputed, witnesses for the plaintiff testified that the cargo had been improperly stowed "bag on bag" (each layer of bags running in the same direction as the layer beneath it) instead of in the safer "lock stow" (each layer of bags running perpendicular to the layer beneath it). Marant was injured when a tier of bags collapsed and hit him. A witness testified that the collapsing tier was about 15 feet high, that it stood behind another tier 12 feet high, and that Marant was standing 6 or 7 feet from the tier that fell on him. The central issue at trial was the method adopted in stowing the bags.

The jury returned a liability verdict against Farrell. By special interrogatories it determined that Marant was not contributorily negligent, that Lavino and Farrell were both negligent, and that each had contributed 50 percent to the happening of the accident. Damages were stipulated as $20,000 and the district court entered judgment in favor of Marant and against Farrell in that amount. Farrell's motion for judgment notwithstanding the verdict or for a new trial was denied.

Farrell raises the following points on appeal:

(1) Under the 1972 Amendments to the LHWCA, the stevedore has the primary responsibility for longshoremen's safety and the vessel's duty is only to disclose latent defects of which it has knowledge. Under this law and the factual circumstances, the district court erroneously failed to direct a verdict for Farrell. In addition, it incorrectly charged the jury as to Farrell's duty under the law and compounded that error by repeating the original confusing charge verbatim when asked by the jury for clarification of the relative duties of vessel and stevedore.

(2) Under the 1972 Amendments to the LHWCA, a vessel cannot be held liable where the stevedore contributed to a longshoreman's injury.

(3) The jury verdict was clearly against the weight of the evidence.

(4) Where the jury found that Farrell's negligence contributed 50 percent to the happening of the accident, Farrell should be assessed only 50 percent, or $10,000, of the stipulated damages of $20,000.

II.

As a preliminary matter, we will deny Farrell's request for a directed verdict in its favor. We cannot say, as a matter of law, that the record is "critically deficient of that minimum quantum of evidence from which a jury might

reasonably afford relief." *Denneny v. Siegel,* 407 F.2d 433, 439 (3d Cir. 1969).

Farrell has challenged specifically that portion of the trial court's charge which informed the jury that "[t]he responsibility for the safety of the longshoreman lies concurrently or jointly with the longshoreman's employer, and with the shipowner." (546a-547a) Farrell asserts that this is an inaccurate statement of the relative responsibilities imposed by the 1972 Amendments to the LHWCA and that the trial court should have charged, as Farrell requested (405a), that the primary responsibility for longshoremen's safety was on the stevedore. A recent decision of this court, not available to the district court at the trial of this case, substantiates Farrell's position. Accordingly, on the basis of *Brown v. Rederi,* — F.2d —, No. 76-1037 (3d Cir., Nov. 4, 1976), we will order a new trial.

As Judge Van Dusen has recently observed, speaking for this court, "express language in the statute and the legislative reports accompanying the 1972 Amendments amply demonstrate that for reasons of policy the major responsibility for the proper and safe conduct of the work was to be borne by the stevedore." *Brown v. Rederi,* slip op. at 11. This was an important aspect of the legislative plan, intended to focus responsibility for longshoremen's safety on those best able to improve it, the stevedores. To say that responsibility is concurrent or joint is plainly inconsistent with the intention of the Act to place primary responsibility on the stevedore.

The principle of concurrent or joint responsibility was stated as the first substantive legal precept in the charge. It was reiterated later when the court told the jury that it was their job to decide if the stevedore was "solely or concurrently" responsible (548a), and it was, at least by implication, reinforced when the court charged that "[t]he duty to provide a reasonably safe place to work can rest upon more than one party, and it includes the owner of the vessel." (549a) After being sent out to deliberate, the jury returned to ask the court, *inter alia:* "Is it the ship's re-

sponsibility to provide a safe and reasonable place for the men to work in the hold as per your charge?" (569a-570a) The court answered by repeating verbatim the portion of its charge beginning:

> You have for your determination the claim that the owner of the vessel or its agents were negligent toward plaintiff, a longshoreman. The shipowner, for its part, denied plaintiff's allegation of negligence.
>
> The responsibility for the safety of a longshoreman lies concurrently or jointly with the longshoreman's employer and with the shipowner.

(570a) We have no way of knowing, of course, but it seems not unlikely that the equal responsibility portion of the jury instructions played a part, at least, in the jury's decision that the vessel and the stevedore were equally at fault in causing the accident.

The question of relative legal responsibility went to the very essence of the case; the jury's question amply evidences their awareness of its importance. Particularly under these circumstances, we believe that Farrell is entitled to a new trial. Upon remand, the district court will now have the advantage of our analysis of the 1972 Amendments in *Brown, supra,* and also in *Griffith v. Wheeling Pittsburgh Steel Corp.*, 521 F.2d 31 (3d Cir. 1975), *cert. denied,* 96 Sup. Ct. 785 (1976); and we will direct consideration of these precedents insofar as they are relevant to issues that may be raised.[1]

1. In *Brown,* we emphasized the relevance of § 941(a) of the Act:

> Every employer shall furnish and maintain employment and places of employment which shall be reasonably safe for his employees in all employments covered by this chapter and shall install, furnish, maintain, and use such devices and safeguards with particular references to equipment used by and working conditions established by such employers as the Secretary may determine by regulation or order to be reasonably necessary to protect the life, health, and safety of such em-

III.

As a new trial will be required in any event, it is not necessary for us to meet appellant's additional points. We will take this opportunity, however, to express our concern about the question of apportionment of damages in cases where it is found that stevedore and vessel have been concurrently at fault. We recognize that the apportionment question is fraught with difficulty, that it involves largely intractable conflicting interests, and that it implicates in contradictory ways three ordinarily separate fields of law, to-wit, the common law of torts, statutory workmen's compensation law, and the law maritime. But, as we view it, there are really only three alternatives.

First, the vessel could be made to pay the whole of the damages without reduction for the stevedore's fault and without contribution from the stevedore. Second, the vessel, after paying the whole of the damages, might be held entitled to a true "contribution" from the stevedore, either in a fixed percentage or according to relative fault. Third, the vessel might be held entitled to a reduction of liability or a "credit" because of the stevedore's concurring fault, again, either in a fixed percentage or according to relative fault. This last concept of a credit to the vessel is a rela-

1. (Cont'd.)

> ployees, and to render safe such employment and places of employment and to prevent injury to his employees.

33 U.S.C. § 941(a) (1970).

We also indicated the possible importance of non-compliance with the applicable OSHA Safety and Health Regulations. The responsibility for compliance with the regulations is on employers. "It is not the intent of the regulations of this part to place additional responsibilities or duties on owners, operators, agents or masters of vessels unless such persons are acting as employers . . . ." 29 C.F.R. § 1918.2. The OSHA regulation relating to stowed cargo would seem to be of special relevance to the case at bar:

> 29 C.F.R. § 1918.83 Stowed cargo, tiering and breaking down.
>
> (a) When necessary, cargo shall be secured or blocked to prevent its shifting or falling.
>
> (b) In breaking down, precautions shall be taken, when necessary, to prevent the remaining cargo from falling.

tive newcomer on the legal scene. It has been espoused by some of the commentators,[2] and embraced by several federal trial courts,[3] but, to date, has not found wide acceptance in appellate jurisprudence.

A fixed 50 percent reduction of recovery was allowed by the Court of Appeals for the District of Columbia Circuit in a case implicating the Federal Employees' Compensation Act, *Murray v. United States,* 405 F.2d 1361 (D.C. Cir. 1968), and has come to be known as a "Murray Credit". Judge Leventhal, writing for a panel of himself, Judge McGowan, and now-Chief Justice Burger, explained the result thus:

> A tortfeasor jointly responsible with an employer is not compelled to pay the total common law damages. The common law recovery of the injured employee is thus reduced in consequence of the employee's compensation act, but the act gave him assurance of compensation even in the absence of fault.

Ibid. at 1366. The Murray Credit was subsequently extended to a case arising under the pre-1972 LHWCA, *Dawson v. Contractors Transport Corp.,* 467 F.2d 727,

2. The idea of a proportionate or "equitable" credit is proposed in Cohen and Dougherty, *The 1972 Amendments to the Longshoremen's and Harbor Workers' Compensation Act: An Opportunity for Equitable Uniformity in Tripartite Industrial Accident Litigation,* 19 N.Y.L.F. 587 (1974). It is further discussed and advocated in Coleman and Daly, *Equitable Credit: Apportionment of Damages According to Fault in Tripartite Litigation Under the 1972 Amendments to the Longshoremen's and Harbor Workers' Compensation Act,* 35 MD. L. REV. 351 (1976).

3. *Croshaw v. Koninklijke Nedlloyd, B. V. Rijswijk,* 398 F. Supp. 1224 (D. Ore. 1975) (accepting credit in theory but declining to apply it because of contrary precedent in the district); *Frasca v. Prudential-Grace Lines, Inc.,* 394 F. Supp. 1092 (D. Md. 1975); *Shellman v. United States Lines, Inc.,* 175 A.M.C. 362 (C.D. Cal. 1974), *rev'd,* 528 F.2d 675 (9th Cir. 1975); *contra, Santino v. Liberian Distance Transports, Inc.,* 405 F. Supp. 34 (W.D. Wash. 1975); *Hubbard v. Great Pacific Shipping Co.,* 404 F. Supp. 1242 (D. Ore. 1975); *Lucas v. "Brinknes" Schiffahrts Ges. Franz Lange G.m.B.H. & Co.,* 379 F. Supp. 759 (E.D. Pa. 1974) (specially convened three-judge panel).

729-30 (D.C. Cir. 1972), Judge McGowan further elaborating the result as follows:

> Since employers covered by workmen's compensation statutes are not liable in tort to their injured employees, other tortfeasors are not entitled to contribution from negligent employers, and thus, before *Murray,* bore the entire burden of the tort damages.
>
> To mitigate the harshness of this result, we held in *Murray* that a person against whom the employee was awarded damages in a tort action could reduce the judgment by 50 per cent if he could show that the employer's negligence contributed to the injury.[3]

3. *Murray* was itself an extension of this court's rule in Martello v. Hawley, 112 U.S. App. D.C. 129, 300 F.2d 721 (1962), where we held that when a plaintiff settled his claim against one tortfeasor, another tortfeasor against whom the plaintiff actually brought suit was entitled to reduce a resulting judgment by 50%.

Although *Murray* involved the Federal Employees' Compensation Act, 5 U.S.C. § 8101 et seq. (1970), its rationale applies equally to the virtually identical provisions of the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. § 901 et seq. (1970) . . . .

While *Dawson* did apply the credit concept to the LHWCA, the 1972 amendments were not implicated in the case and, accordingly, the question may be considered open whether the District of Columbia Circuit will continue to adhere to *Dawson* in cases arising under the 1972 amendments.

The idea of a reduction of recovery proportioned according to fault—an "Equitable Credit"—has been rejected by the only Court of Appeals that has directly considered it, the Ninth Circuit. In *Dodge v. Mitsui Shintaku Ginko,* 528 F.2d 669, 672 (9th Cir. 1975), *cert. denied,* 96 Sup. Ct. 1685 (1976), Senior Judge Brown rejected "both the Murray and Shellman [Equitable Credit] Doctrines because they are contrary to the greater weight of authority, and also because they impose unjustified burdens upon the injured longshoreman." Judge Brown reaffirmed this

result, on identical grounds and for the same panel, in a companion case, *Shellman v. United States Lines,* 528 F.2d 675 (9th Cir. 1975), *cert. denied,* 96 Sup. Ct. 1668 (1976).

The Second Circuit, in *Landon v. Lief Hoegh & Co.,* 521 F.2d 756 (2d Cir. 1975), *cert. denied,* 423 U.S. 1053 (1976), held that the stevedore was not a necessary or indispensable party in an action by the longshoreman against the vessel, but did not adjudicate the specific question of a credit. Similarly, the Supreme Court precedent most often cited on the question, *Halcyon Lines v. Haenn Ship Ceiling & Refitting Corp.,* 342 U.S. 282 (1951), denied contribution from the stevedore-employer to the vessel but did not directly present for adjudication the possibility of a credit. And it is well established that "[a] decision is not authority as to any questions of law which were not raised or presented to the court, and were not considered and decided by it, even though they were logically present in the case and might have been argued, and even though such questions, if considered by the court, would have caused a different judgment to be given." H. Black, Law of Judicial Precedents 37 (1912). *See Kramer v. Scientific Control Corp.,* 534 F.2d 1085, 1090 (3d Cir.), *cert. denied,* 45 U. S. L. W. 3226 (Oct. 5, 1976).

Though our research has not been exhaustive, we do not perceive a "greater weight" of authority on the issue of a credit. On the contrary, our observation would be that, of the two courts of appeals that have considered the general credit concept under the LHWCA, one has accepted it, albeit prior to the 1972 amendments, and one has rejected it. We have found no Supreme Court precedent directly dispositive of the issue, and the district courts are in disarray. Under these circumstances, and particularly in view of the Supreme Court's activist attitude in maritime matters, *see United States v. Reliable Transfer Co.,* 421 U.S. 397 (1975), we believe that the question of a possible credit to the vessel in cases of concurrent stevedore-vessel negligence is, at least in this circuit, very much an open question.

The concurring opinion expresses concern that any credit or apportionment rule would lead to increased litigation and that, even "if" the present rule is unfair, change should come from Congress. This court being already inundated with LHWCA litigation to interpret the 1972 amendments, it is difficult—though concededly frightening—to imagine an increase. It would seem as likely, however, that a rule which equitably apportioned liability according to fault might decrease litigation and promote settlement, especially by removing the incentive of a large judgment against a shipowner who is only partly at fault. As the Supreme Court has recently observed: "Experience with comparative negligence in the personal injury area teaches that a rule of fairness in court will produce fair out-of-court settlements." *United States v. Reliable Transfer Co., supra,* 421 U.S. at 408. Concerning the propriety of judicial as against legislative action in this field, we will resist today the temptation to continue the venerable debate. Suffice it to say, in Judge Walter Schaefer's eloquent words, that "most depends upon the judge's unspoken notion as to the function of his court. If he views the role of the court as a passive one, he will be willing to delegate the responsibility for change, and he will not greatly care whether the delegated authority is exercised or not. If he views the court as an instrument of society designed to reflect in its decisions the morality of the community, he will be more likely to look precedent in the teeth and to measure it against the ideals and the aspirations of his time." W. Schaefer, *Precedent and Policy,* 34 U. Chi. L. Rev. 3 (1966) (quoted in R. Aldisert, The Judicial Process at 802, 814 (1976)). Although we have indicated some of our concerns on the difficult issue of apportionment, we emphasize, again, that we expressly do not decide the issue at this time.

The judgment of the district court will be reversed and the cause remanded for further proceedings in accordance with the foregoing.

USCA(3) CONCURRING OPINION IN MARANT v. FARRELL LINES.

VAN DUSEN, *Circuit Judge,* concurring:

I join in parts I and II of the majority opinion. Also, I agree with the conclusion of part III that the issues of apportionment of damages between the stevedore and the ship, where they are both at fault, should not be reached on this appeal. I cannot agree with the extensive dicta in part III, which I believe should be omitted until there is an appropriate record requiring decision of the issues discussed there. However, in view of part III of the majority opinion, I feel it is desirable to set forth a number of other factors which are relevant to the issues in part III and should be considered by any trial court which is required to directly face these issues in the future.

A judicial apportionment of damages doctrine in cases brought against the vessel under 33 U.S.C. § 905(b) may be inconsistent with the intent of Congress [1] in enacting P.L. 92-576 (Oct. 27, 1972) for these reasons:

1. A judicial doctrine of apportionment of damages in 905(b) cases would result in the increased litigation that

1. It is clear that Congress gave careful thought to the statutory scheme of the Longshoremen's and Harbor Workers' Compensation Act (LHWCA) and the changes in that scheme brought about by the enactment of P.L. 92-576 in 1972. Both Houses of Congress held extensive hearings on proposed bills incorporating different changes, see *Hearings on S. 2318, S. 525, S. 1547 Before the Subcomm. on Labor of the Senate Comm. on Labor and Public Welfare,* 92d Cong., 2d Sess. (1972), *Hearings on H.R. 247, H.R. 3505, H.R. 12006, H.R. 15023 Before the Subcomm. on Labor of the House Comm. on Education and Labor,* 92d Cong., 2d Sess. (1972), and both Houses wrote extensive committee reports to explain the purpose underlying P.L. 92-576, see S. Rep. No. 1125, 92d Cong., 2d Sess. (1972), H. Rep. No. 1441, 92d Cong., 2d Sess. (1972). See also Comment, *Negligence Standards Under The 1972 Amendments to the Longshoremen's and Harbor Workers' Compensation Act: Examining the Viewpoints,* 21 Vill. L. Rev. 244 (1975-1976).

Congress sought to avoid by the 1972 Amendments, which inserted this wording in 33 U.S.C. § 905(b):

> "(b) In the event of injury to a person covered under this chapter caused by the negligence of a vessel, then such person, or anyone otherwise entitled to recover damages by reason thereof, may bring an action against such vessel as a third party in accordance with the provisions of section 933 of this title and *the employer shall not be liable to the vessel for such damages directly or indirectly* and any agreements or warranties to the contrary shall be void. . . . *The remedy provided in this subsection shall be exclusive of all other remedies against the vessel* except [the right of the employer of the longshoreman to recover compensation paid from a vessel found negligent under § 905(b). See 33 U.S.C. § 933(b).]"
> (Emphasis supplied.)

These Amendments inserted this language in 33 U.S.C. § 905(a):

> "§ 905. Exclusiveness of liability
>
> "(a) The liability of an employer prescribed in section 904 of this title shall be exclusive and in place of all other liability of such employer to the employee, his legal representative . . . and anyone otherwise entitled to recover damages from such employer at law or in admiralty on account of such injury or death . . . ."

The Senate Report on P.L. 92-576 at 4-5, 9 and 11 uses this language:

> "The social costs of these law suits, the delays, crowding of court calendars and the need to pay for

lawyers' services have seldom resulted in a real increase in actual benefits for injured workers.

"For a number of years representatives of the employees have attempted to have the benefit levels under the Act raised so that injured workers would be properly protected by the Act. At the same time, employer groups indicated their willingness to increase such payments but indicated they could do so only if the Longshoremen's and Harbor Workers' Compensation Act were to again become the exclusive remedy against the stevedore as had been intended since its passage in 1927 until modified by various Supreme Court decisions.

. . .

"The Committee heard testimony that the number of third-party actions brought under the *Sieracki* and *Ryan* line of decisions has increased substantially in recent years and that much of the financial resources which could better be utilized to pay improved compensation benefits were now being spent to defray litigation costs. Industry witnesses testified that despite the fact that since 1961 injury frequency rates have decreased in the industry, and maximum benefits payable under the Act have remained constant, the cost of compensation insurance for longshoremen has increased substantially because of the increased number of third party cases and legal expenses and higher recoveries in such cases. The Committee also heard testimony that in some cases workers were being encouraged not to file claims for compensation or to delay their return to work in the hope of increasing their possible recovery in a third party action. The Committees attention was also called to the decision in 1966 of the United States district court in Philadelphia concerning the impact of third party claims involving

injured longshoremen on the backlog of personal injury cases in that court.[2]

. . .

"Since the vessel's liability is to be based on its own negligence, and the vessel will no longer be liable under the seaworthiness doctrine for injuries which are really the fault of the stevedore, there is no longer any necessity for permitting the vessel to recover the damages for which it is liable to the injured worker from the stevedore or other employer of the worker.

"Furthermore, unless such hold-harmless, indemnity or contribution agreements are prohibited as a matter of public policy, vessels by their superior economic strength could circumvent and nullify the provisions of Section 5 of the Act by requiring indemnification from a covered employer for employee injuries.

"Accordingly, the bill expressly prohibits such recovery, whether based on an implied or express warranty. It is the Committee's intention to prohibit such recovery under any theory including, without limitation, theories based on contract or tort.

"Under the proposed amendments the vessel may not by contractual agreement or otherwise require the

2. This apparently refers to the case of *Turner v. Transportacion Maritima*, 44 F.R.D. 412 (E.D. Pa. 1968), which described the court congestion in this Circuit caused by the decisions of *Seas Shipping Co. v. Sieracki*, 328 U.S. 85 (1946), and *Ryan Stevedoring Co. v. Pan-Atlantic Steamship Corp.*, 350 U.S. 124 (1956). It may well be that a judicial apportionment of damages doctrine will increase litigation and may possibly have a similar impact in not only the district courts but this court as well. If such litigation does result, this will undermine the congressional purpose to free the courts from the burden of these longshoremen cases by enacting P.L. 92-576. The Chief Justice of the United States has pointed out that the impact of legislation and court decisions should be carefully considered by courts prescribing such legal rules. See, *e.g.*, The State of the Judiciary—1975, by Chief Justice Burger, 61 A.B.A.J. 439 (1975).

employer to indemnify it, in whole or in part, for such damages."

Part III does not meet the problems raised by the authorities cited, since it appears that a likely result of the "equitable credit" doctrine or any similar apportionment of liability would be to, once again, drag the stevedore back into the litigation process (thus undermining the safety) [3] in order to defend the subrogation lien he has on the longshoreman's recovery against the vessel.[4] See *Pope & Talbot v. Hawn,* 346 U.S. 406, 411-12 (1953); Third Circuit cases cited in footnote 6 of *Brown v. Rederi,* Opinion of November 4, 1976 (3d Cir., No. 76-1037); 33 U.S.C. § 933, as amended.

3. It is clear that a major congressional concern in enacting P.L. 92-576 was that maritime safety be enhanced. The Senate Report contains this language:

> "It is important to note that adequate workmen's compensation benefits are not only essential to meeting the needs of the injured employee and his family, but, by assuring that the employer bears the cost of unsafe conditions, serve to strengthen the employer's incentive to provide the fullest measure of on-the-job safety.
>
> "This consideration is particularly crucial with respect to high-risk occupations such as those covered by this Act. Longshoring, for example, has an injury frequency rate which is well over four times the average for manufacturing operations. It is the Committee's view that every appropriate means be applied toward improving the tragic and intolerable conditions which take such a heavy toll upon workers' lives and bodies in this industry, and such means clearly include vigorous enforcement of the Maritime Safety Amendments of 1958 and the Occupational Safety and Health Act of 1970, as well as a workmen's compensation system which maximizes industry's motivation to bring about such an improvement."

Senate Report No. 92-1125, 92d Cong., 2d Sess., 2 (1972).

4. It is clear that a judicial doctrine of apportionment of damages in these suits will make the stevedore an indispensable party to the action. If the stevedore is not a party, then any finding assessing his proportionate fault will not be *res judicata* against him in a later suit asserting those rights afforded to him by 33 U.S.C. § 933, as amended by P.L. 92-576. See, *e.g.,* Restatement of Judgments § 6 (1942). See paragraph 2 below.

2. In any event, the cases of *Murray v. United States,* 405 F.2d 1361 (D.C. Cir. 1968),[5] and *Dawson v. Contractors Transport Corp.,* 467 F.2d 727 (D.C. Cir. 1972),[6] were decided before 1972 when the Congress amended 33 U.S.C. §§ 905 and 933, as the majority points out in part III of its opinion. For this reason, these cases have a doubtful value as precedent for creating a judicial doctrine of apportionment of damages in § 905(b) cases. Also, there are other substantial reservations concerning the applicability of *Dawson* and *Murray* in the maritime section 905(b) actions where an injured longshoreman sues the vessel, since both *Dawson* and *Murray* involved exclusively land-based employees engaged in exclusively land-based occupations when injured.[7] Secondly, the *Murray* opinion does not deal with the so-called "lien" right which the employer and compensation insurer (by way of subrogation) have under 33 U.S.C. § 933,[8] as amended by P.L. 92-576. In *Dawson,* Judge McGowan indicated his concern that the problems raised by § 933 had not been considered in the

5. It is apparent from the *Murray* opinion that two important theoretical considerations in the court's mind in reaching the result were (1) the doctrine of sovereign immunity since the United States was the compensation employer, and (2) the "indemnification doctrine" of *Ryan Stevedoring Co. v. Pan-Atlantic Steamship Corp.,* 350 U.S. 124 (1956). The sovereign immunity doctrine has no place in this case and the *Ryan* doctrine was explicitly abrogated by the Congress in enacting P.L. 92-576. See page A55 above.

6. In view of Judge McGowan's first sentence in *Dawson* and the fact that the district court did not allow a "Murray credit" set-off in the case, I have considerable doubt about the precise meaning of that case and consequently its applicability to longshoremen's third-party suits brought under § 905(b), as amended by P.L. 92-576.

7. This factor formed the basis for Judge Huyett's rejection of the "Murray credit" in *Lucas v. "Brinknes" Schiffahrts Ges.,* 379 F. Supp. 759, 764 (E.D. Pa. 1975), *appeal dismissed,* No. 75-1223 (3d Cir., Apr. 30, 1975), *cert. denied,* 423 U.S. 866 (1975), a case cited by this court in *Brown, supra* at 9 note 6.

8. See *Brown, supra* at 9 note 6; 1A Benedict on Admiralty § 28 (7th ed. rev., 1973 release).

court's earlier opinion in *Murray,* using this language in note 3 at page 730:

> "The District Court was concerned primarily with the apparent inability of an employer, if *Murray* is applied, to obtain reimbursement for payments made under the compensation statute. [Citing cases.]
>
> "The employer's right to reimbursement from his employee is not an issue in this case. Moreover, the question of *Murray's* validity was not argued to this panel, which, in any event, is without authority to overrule prior decisions of this court. Consequently, we assume the continuing validity of the *Murray* rule and its application to cases involving the Longshoremen's and Harbor Workers' Compensation Act."

3. Two of the leading admiralty jurisdictions have written decisions which indicate that those Circuits will not follow an "equitable credit" doctrine or any similar apportionment of liability in § 905(b) cases under the 1972 Amendments. See *Dodge v. Mitsui Shintaku Corp.,*[9] 528 F.2d 669, 672 (9th Cir. 1975); *Landon v. Lief Hoegh,* 521 F.2d 756, 760, 763 (2d Cir. 1975). It would seem that resolution of the "contribution" issue was a necessary step in *Landon* and since this Circuit shares admiralty jurisdiction with the Second Circuit over the country's major port complex, the New York-Newark-Elizabeth area, the *Landon* case especially, and also the *Dodge* case, ought to be considered carefully before this court accepts the "equitable credit" doctrine or any similar theory of apportionment of liability in § 905(b) cases. To enact a judicial apportionment of damages in this Circuit in view of these other cases may undermine the essential uniformity which the Congress intended the 1972 Amendments to the Longshoremen's and Harbor Workers' Compensation Act to have. See *Brown, supra* at pp. 14-15 of slip

9. Most of the cases cited in note 3, page A48, of the majority opinion as supporting an apportionment of damages theory are from the Ninth Circuit and were decided before *Dodge.*

opinion; see also G. Gilmore & C. Black, The Law of Admiralty, at 48 (2d ed. 1975) (hereinafter cited as Gilmore & Black).

4. In *Brown, supra,* we pointed out that the trial court's instruction erroneously imposed the stevedore's negligence upon the vessel. Apparently Congress intended that the doctrine of vicarious liability would not apply in § 905(b) actions. Similarly, the application of an "equitable credit" doctrine or other judicial apportionment of damages means that the longshoreman, in effect, will be *vicariously* liable for the negligence of his stevedore-employer to the extent that the amount of the reduction ($10,000. in this case) exceeds the compensation paid by the employer.[10] Such a result has been condemned by Dean

10. Professor Arthur Larson, a leading authority in the field of workmen's compensation law, offers the following analysis of *Murray:*

> "Assume the total damages are $20,000, . . . if the plaintiff had received $9,000 in workmen's compensation under *Murray,* the employee would have to pay $9,000 over to the employer out of his $10,000 recovery, leaving him with a total recovery of compensation plus damages of only $10,000.
>
> "On the practical and policy side, the prime defect of the *Murray* result is that there is no rational relation between the fifty percent reduction in plaintiff's recovery and the interests of either the employee or the employer. Let us go back to the facts of the *Kittleson* case with which this section opened. The compensation liability there was $6,800 and the third-party recovery was $60,000. If this situation were to arise under the *Murray* case, the plaintiff, instead of recovering $60,000 and reimbursing the employer for $6,800, thus retaining $53,200, would recover only $30,000 from the third party, plus his $6,800 compensation, for a total of $36,800—in spite of the fact that at the trial he must be assumed to have established actual damages of $60,000. By what conceivable logic can he be told that he should absorb a loss of $16,400 for the benefit of the third-party tortfeasor?
>
> "A rule capable of producing such a result is clearly unacceptable, particularly since its legal underpinnings are just as unsound as its practical result."

2A A. Larson, The Law of Workmen's Compensation, § 76.22 at pp. 14-318 to 14-319 (Release No. 17, 1974) (hereinafter cited as 2A Larson).

Prosser. See W. Prosser, The Law of Torts, § 74 (4th ed. 1971). The unfairness of this result has increased and confused the litigation in the common law courts when they have engrafted a judicial apportionment of damages concept onto the situation of the workmen's compensation third-party suit where the injury occurred partially as a result of the negligence of the compensation employer. See the thorough review of this problem in 2A Larson, §§ 75.22-75.23; 76.00 *et seq.*; 77.00 *et seq.*

5. To create judicially an "apportionment of damages" doctrine into § 905(b) cases may greatly undercut major congressional policy considerations underlying the 1972 Amendments without providing adequate replacements for them. For instance, a major complaint of longshoremen's labor representatives in the Senate and House hearings considering the 1972 Amendments to §§ 933 and 905 was that most vessels upon which these men worked were of foreign registry and, thus, did not adhere to American safety standards under OSHA and other maritime safety statutes and regulations. Congress may have felt that, in allowing a longshoreman to recover full damages against the vessel without regard to the relative fault of the stevedore, a practical incentive would be provided for these vessels and their owners to adhere to American safety standards. Also, formulating the "rules" for uniform results under an "equitable credit" doctrine may well exceed the courts' Article III power. A court-created apportionment doctrine would be without a well formulated structure.[11] If the result of § 905(b) is unfair to the vessel owner, he should apply for relief to the Congress and not to this court.

11. *United States v. Reliable Transfer*, 421 U.S. 397 (1975), involved the abrogation of a completely court created rule. Applying that case to § 905(b) cases would be engrafting an apportionment of damages remedy onto a complex and carefully thought out statutory structure with which the Congress intended to fix the rights of the stevedore, vessel owner, and longshoreman. See also *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375, 388-408 (1970); Gilmore & Black, §§ 6-31 to 6-33, 7-20; 2A Larson §§ 76.00 *et seq.*

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

—

No. 76-1383

—

MILTON MARANT

v.

FARRELL LINES, INC.,
Appellant

—

(D.C. Civil Action No. 73-2615)

—

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

—

Present: VAN DUSEN, BIGGS and ALDISERT, *Circuit Judges*

—

JUDGMENT.

This cause came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court the the judgments of the said District Court filed July 28, 1975 and January 19, 1976, be, and the same are hereby reversed and the cause is remanded for further proceedings in accordance with the opinion of this Court. Costs taxed against the appellee.

ATTEST:

THOMAS F. QUINN
Clerk

January 31, 1977

Supreme Court, U. S.
FILED
MAR 25 1977
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1976

No. 76-1182

THOMAS BROWN, *Petitioner*

v.

IVARANS REDERI, *Respondent*

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

RAWLE AND HENDERSON
2100 Packard Bldg.
Philadelphia, Penna.

J. GRANT MCCABE, III
ROBERT B. WHITE, JR.

THE LEGAL INTELLIGENCER, 66 NORTH JUNIPER STREET, PHILA., PA. 19107 (215) 561-4850

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1976

No. 76-1182

Thomas Brown, *Petitioner*

v.

Ivarans Rederi, *A/S, Respondent*

Respondent's Brief in Opposition to Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

ARGUMENT

I. There is no split of authority between the various Courts of Appeals as suggested by Petitioner.

Petitioner seeks to invoke the jurisdiction of this Court on writ of certiorari pursuant to Rule 19(1)(b) of the Rules of the Supreme Court of the United States which, in pertinent part, states:

> A review on writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons therefor. The following, while neither controlling nor fully measuring the court's discretion, indicate the character of reasons which will be considered:
>
> (b) Where a court of appeals has rendered a decision in conflict with the decision of another court of appeals *on the same matter* (emphasis added).

Petitioner asserts that there is a split of authority between various courts of appeals concerning application of §416 of the RESTATEMENT (SECOND) OF TORTS to a longshoreman's negligence cause of action against a shipowner under 33 U.S.C. §905(b). Alternatively, Petitioner asserts that there is a conflict between and within various courts of appeals concerning the standard of care owed by a shipowner to a longshoreman under 33 U.S.C. §905(b). Neither of Petitioner's assertions is well-founded.

The decision of the Third Circuit herein granting Respondent a new trial addressed a single issue, *viz.*, the propriety of instructions to the jury based on §416 of the RESTATEMENT (SECOND) OF TORTS in a longshoreman's action against a shipowner governed by 33 U.S.C. §905(b). The Third Circuit *held* that such instructions were improper because they were inconsistent with the express

language of §905(b) which does not permit a shipowner to be vicariously liable for the negligence of a stevedore.

Petitioner has cited no decision from another court of appeals which is in conflict with the issue decided by the Third Circuit herein. In fact, Petitioner has cited no other court of appeals decision that has addressed the issue.

There being no conflicting decisions between the various courts of appeals on the issue decided by the Third Circuit herein, Petitioner claims that a conflict exists between the Third Circuit decision herein and the decision of the District Court for Oregon in *Croshaw v. Koninklijke Nedlloyd, B. V. Rijswijk*, 398 F.Supp. 1224 (D.Ore. 1975). Notwithstanding that *Croshaw* is a decision of one of the many district courts within the appellate jurisdiction of the Ninth Circuit Court of Appeals, it is not in conflict with the Third Circuit holding herein. Petitioner's statement at pages 11-12 of his Petition that *Croshaw* "recognized that an application of Section 343 must also take into account, *inter alia*, Section 416 of the RESTATEMENT OF TORTS 2d when applicable and when the vessel owner has scienter" is erroneous. *Croshaw* neither considered nor decided whether §416 of the RESTATEMENT (SECOND) OF TORTS is a proper basis for imposing liability on a shipowner for the negligence of a stevedore under 33 U.S.C. §905(b). In fact, *Croshaw* did not discuss §416 of the RESTATEMENT (SECOND) OF TORTS. Rather, the District Court observed that: "The shipowner is not liable for dangerous conditions created by the stevedore's negligence while the stevedore has exclusive control over the manner and area of the work." 398 F.Supp. at 1229. In support of its observation, the District Court cited §409 of the RESTATEMENT (SECOND) OF TORTS. 398 F.Supp. at 1229-30. In passing, the District Court noted that the rule of §409 has exceptions and cited §§409-429 of the RESTATEMENT (SECOND) OF TORTS. The District Court did not hold, as suggested by Petitioner, that §416 of the RESTATEMENT (SECOND) OF TORTS is a permissible exception in longshoremen's negli-

gence actions against shipowners under 33 U.S.C. §905(b).

Not surprisingly, Petitioner failed to cite *Teofilovich v. d'Amico Mediterranean/Pacific Line*, 415 F. Supp. 732 (C.D.Cal. 1976), which was decided by a district court also within the appellate jurisdiction of the Ninth Circuit. *Teofilovich* specifically considered the issue decided by the Third Circuit herein. The *Teofilovich* holding is consistent with the Third Circuit holding herein.

With respect to Petitioner's alternative assertion that Third Circuit decisions are in conflict with decisions from other circuits on the proper standard of care to be applied to shipowners pursuant to 33 U.S.C. §905(b) actions, no conflict exists because the Third Circuit has not decided the standard of care issue either in the instant case or in *Marant v. Farrell Lines, Inc.*, — F.2d — (3d Cir. 1977) (A42-A61 of Petition for Writ of Certiorari herein) cited by Petitioner. Petitioner's statement at page 14 of his Petition that the Third Circuit has rejected §§343 and 343A of the RESTATEMENT (SECOND) OF TORTS, therefore, is incorrect.

After devoting the substantial portion of its Opinion to the reasons in support of its holding that §416 of the RESTATEMENT (SECOND) OF TORTS is not applicable to actions governed by 33 U.S.C. §905(b), the Third Circuit in *Brown*, in a brief concluding paragraph, volunteered *dicta* on the standard of care issue to be considered by the District Court on remand. That the comments of the Third Circuit on the standard of care issue are *dicta* is obvious from the express language used as follows:

> The parties in this case would have us *suggest to the district court* the standard of care a vessel owes to a longshoreman under the negligence remedy created by §905(b). *It would appear* that the principles of the law of negligence, as adopted in the admiralty field during the history of our country, are to form the basis of any recovery against shipowners insofar as

> such principles are not inconsistent with §905(b). 545 F.2d at 863 (emphasis added).

Within its *dicta* on the standard of care issue, the Third Circuit added footnote 10 in which it cited *Napoli v.* [*Transpacific Carriers, etc.*] *Hellenic Lines*, 536 F.2d 505 (2d Cir. 1976), and stated: "[W]e do not find it persuasive *on the facts presented by this appeal.*" 545 F.2d at 864, n. 10 (emphasis added).

It is submitted that the Third Circuit *dicta* in *Brown* is in the nature of an advisory opinion which is surprising in view of its earlier refusal in *Griffith v. Wheeling Pittsburgh Steel Corp.*, 521 F.2d 31 (3d Cir. 1975), to render an advisory opinion on the standard of care issue. There, the Third Circuit stated: "The district court did not decide any standard of care issue, and none is before us in a context sufficiently concrete and adversary for our decision at this time." 521 F.2d at 45.

Similarly, the holding of the Third Circuit in *Marant* was not addressed to the standard of care issue. Rather, *Marant* holds that a jury instruction which equates a shipowner's responsibility with a stevedore's responsibility in actions governed by 33 U.S.C. §905(b) is improper. A district court must instruct a jury that the major responsibility for longshoremen's safety is on the stevedore. Because the district court improperly instructed the jury, the Third Circuit in *Marant* remanded for a new trial consistent with its opinion.

Recently, this Court was presented with a Petition for Certiorari to the United States Court of Appeals for the Fourth Circuit in *Anuszewski v. Dynamic Mariners Corp., Panama*, 540 F.2d 757 (4th Cir. 1976), *cert. denied*, 45 U.S.L.W. 3563 (U.S. Feb. 22, 1977) (No. 76-920). In *Anuszewski*, the Fourth Circuit, unlike the Third Circuit herein, decided the standard of care issue in connection with actions governed by 33 U.S.C. §905(b). Because the Fourth Circuit opinion is not an advisory opinion on the

standard of care issue, it would have been a more appropriate case for the grant of a Writ of Certiorari than the instant case. In denying the Writ in *Anuszewski*, this Court undoubtedly was cognizant that there are no conflicting decisions between the various courts of appeals that have specifically addressed and decided the standard of care issue in actions governed by 33 U.S.C. §905(b). Uniformly, these courts of appeals have held that analogous land-based principles of law form the proper reference for actions governed by 33 U.S.C. §905(b) and the appropriate analogy is to §343 and §343A of the RESTATEMENT (SECOND) OF TORTS.

Napoli, supra, was the first pronouncement by a court of appeals on the standard of care issue. There, the Second Circuit held that "where a shipowner has notice of an obviously dangerous condition, his duty of care to longshoremen exposed to such danger should be as set forth in §343A of the Restatement of Torts. . . ." 536 F.2d at 509. Similarly, in *Anuszewski, supra*, the Fourth Circuit observed that the district court "elected to follow the standard of the RESTATEMENT (SECOND) OF TORTS, §343 (1965)." 540 F.2d at 759. In affirming, the Fourth Circuit held: "In our opinion the court's choice of the *Restatement* standard was appropriate." 540 F.2d at 759. Most recently, in the companion cases of *Gay v. Ocean Transport & Trading, Ltd.* and *Guerra v. Bulk Transport Corp.*, — F.2d — (5th Cir. 1977) (A26-A41 of Petition for Writ of Certiorari herein), the Fifth Circuit joined the Second and Fourth Circuits in adopting §343 and §343A of the RESTATEMENT (SECOND) OF TORTS as the appropriate standard of care for actions under 33 U.S.C. §905(b). In so holding, the Fifth Circuit stated:

> Our brethern in the Second and Fourth Circuits have already faced the problem before us and have agreed that land-based principles are to guide in the establishment of a federal law. *Anuszewski v. Dynamic Mariners Corp.*, 540 F.2d 757 (4th Cir. 1976); *Napoli v. Hellenic Lines, Ltd.*, 536 F.2d 505 (2d Cir. 1976). Moreover, those circuits have both relied upon the Restatement (Second) of Torts for guidelines . . . In the interest of fulfilling the Congressional desire of uniformity, we, too, adopt the Restatement formulation. (A32-A33 of Petition for Writ of Certiorari herein).

Thereafter, the Fifth Circuit recited §§342, 343 and 343A of the RESTATEMENT (SECOND) OF TORTS and held: "These general standards should be utilized in the future to assure uniformity in cases brought under section 905(b) of the LHWCA to recover for injuries caused by the negligence of the vessel." (A34 of Petition for Writ of Certiorari herein). In concluding its Opinion, the Fifth Circuit stated: "In the interests of uniformity among the courts of this circuit and throughout the federal system, we have adopted the formulation of the Restatement (Second) of Torts §§342, 343 & 343A (1965)." (A41 of Petition for Writ of Certiorari herein).

When the Third Circuit is faced squarely with the standard of care issue "in a context sufficiently concrete and adversary" for a decision, it is conceivable that the Third Circuit will join with the Second, Fourth and Fifth Circuits in holding that §§343 and 343A of the RESTATEMENT (SECOND) OF TORTS are the proper land-based analogues for actions governed by 33 U.S.C. §905(b). In that eventuality, the uniformity between the courts of appeals on the standard of care issue will remain intact and there will be no need for this Court to expend valuable time and energy on an issue not in conflict between the courts of appeals. On the other hand, if a conflict develops in the future, undoubtedly this Court will be called upon to resolve the conflict at that time.

Respondent appreciates that a final judgment is not a prerequisite to this Court's jurisdiction on writ of certiorari. 7B J. Moore, Federal Practice §1254, at JC-366 (2d

ed. 1976). Theoretically, therefore, the writ can issue with respect to the grant of a new trial by the Third Circuit herein. Practically, however, the better practice would be to deny the writ to give the Third Circuit an opportunity to consider the standard of care issue. Possibly, the instant case or *Marant* on remand will provide the Third Circuit with an opportunity to address and decide the standard of care issue.

CONCLUSION

There is no conflict between the courts of appeals on either issue raised under Section I of the Petition for Writ of Certiorari. The issues raised in Sections II and III of the Petition are so devoid of merit and insignificant in the context of this Court's discretionary jurisdiction on writ of certiorari as to not require a response. Accordingly, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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